

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2020] SCCA ... 18 December 2020
SCA 29/2019
(Appeal from CR59/2017)

In the matter between

JONATHAN GEERS

*(rep. by Mr Basil Hoareau together with
Mr Joel Camille)*

First Appellant

SHANNON ESTRALE

rep. by Mr Oliver Chang-Leng)

Second Appellant

and

THE REPUBLIC

(rep. by Mr George Thachette)

Respondent

Neutral Citation: Geers & Anor v Republic (SCA 29/2019) [2020] SCSC 18 December 2020

Before: Robinson, Tibatemwa-Ekirikubinza, Dingake JJA

Summary: Criminal law – video evidence – section 15 of the Evidence Act – Admissibility of video evidence – opportunity for someone to have tampered with the original video – the trial court is required to do no more than to satisfy himself that a prima facie case of originality has been made out by evidence which defines and describes the provenance and history of the recordings up to the moment of production in court – inference drawn on circumstantial evidence – before drawing any inference as to guilt of the First and Second Appellants from circumstantial evidence, trial court had to be sure that there were no other co-existing circumstances which could weaken or destroy the inference – circumstantial evidence in this case falls short of conclusiveness, unclear as to how complainant obtained lacerations, including laceration to neck – accordingly, convictions and sentences set aside. First and Second Appellants acquitted forthwith.

Heard: 2 December 2020

Delivered: 18 December 2020

ORDER

- (i) Appeal of the First and Second Appellants are allowed.
 - (ii) Conviction and sentence of the First Appellant is quashed.
 - (iii) Conviction and sentence of the Second Appellant is quashed.
 - (iv) Both Appellants acquitted forthwith.
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JUDGMENT

ROBINSON JA (TIBATEMWA-EKIRIKUBINZA, DINGAKE JJA CONCURRING)

1. The First and Second Appellants (the First and Second Accused then, respectively), Brendon Jolicoeur, the Third Accused, Rashid Lafleur, the Fourth Accused and Shane Mangro, the Fifth Accused were charged on one count as follows —

"COUNT 1

Statement of offence

Unlawfully wounding with intent to do grievous harm contrary to section 219 (a) read with Section 22 (a) of the Penal Code (Cap 158) and punishable under Section 219 (a) of the Penal Code.

Particulars of offence

Jonathan Geers, 26 years old male Hotel Manager of Bel Ombre, Mahe, Shannon Estrale, 27 year old male self employed of Grand Anse, Praslin, Rashid Lafleur, 25 year old male Insurance Brocker of Le Niole, Mahe, Shane Mangro, 24 year old male self employed of St Louis, Mahe, in the early morning hours of 1st of November 2017, at Fire and Ice Restaurant, Roche-Caiman, Mahe, with common intention, unlawfully wounded one Damien Pierre with intent to do grievous harm to the said Damien Pierre".

2. The learned Judge discharged the Fourth and Fifth Accused.
3. The Third Accused, Rashid Lafleur was convicted and sentenced for the offence of assault causing actual bodily harm. The Third Accused appealed neither against his conviction nor against his sentence.

4. The First and Second Appellants chose to remain silent. The learned Judge convicted and sentenced the First and Second Appellants for the said offence.
5. The learned Judge sentenced the First Appellant to undergo three years and six months imprisonment and to pay a fine of SCR50,000. The learned Judge ordered the First Appellant to pay the fine of SCR50,000 within three months from having served the said prison term. The learned Judge also ordered that the First Appellant shall undergo a further period of six months imprisonment in default of paying the fine of SCR50,000.
6. The learned Judge sentenced the Second Appellant to undergo four years imprisonment and to pay a fine of SCR50,000. The learned Judge ordered the Second Appellant to pay the fine of SCR50,000 within three months of having served the said prison term. The learned Judge also ordered that the Second Appellant shall undergo a further six months imprisonment in default of paying the fine of SCR50,000.
7. In the judgment delivered on the 23 August 2019, the learned Judge summed up his factual findings and stated his conclusions. The findings of fact were as follows —
 1. *"[8] The most compelling piece of evidence relied upon by the Prosecution is a video recording of the incident [...]"*.
 2. *"[31] Thereafter, the first and second Accused charged on the complainant. They launched a ferocious and gratuitous attack on him. He was only trying to get away from them. He was being hit and kicked. Damien tried to escape but the accused kept beating him up and he came to a corner where the first accused continue to brutally assault him and at that point the second accused seemed to look around for something. He returned to join in the merciless attack and that is when blood is seen spilling all over the floor. It is my belief that it was the second accused that slashed the complainant's neck. Once that happened the complainant managed to escape"*.
 3. *"[34] I do believe that bottles were being thrown but not as many as Mathieu Ferrari tried to make us believe. [...] However, I do believe that Damien was shouting that they would "fuck up" the place but from the video he does not exhibit any act of aggression. All acts of aggression were displayed by the accused [...]"*.

4. *"[49] It is without dispute that there was a fight at the Fire and Ice on 1st of November 2017. The accused and Damien were involved. The accused was seen assaulting Damien. The latter never retaliated but was trying to escape the assault. The assault ended when Damien had his neck slashed and blood could be seen spurting all the floor. At the point Damien was able to free himself from the assault and ran away. That is what is recorded on the most crucial direct piece of evidence, the video".*
 5. *"[50] I am confident that the video was not tampered with and it showed the event as it actually happened. [...]. I do believe that Damien was swearing and there is evidence to establish that bottles were being thrown and not solely from Damien. This can be seen from the way people were behaving from Fire and Ice. People only started to rush out after Damien was injured. However, there is no evidence that any of the bottles were directed towards the accused and none of them were injured".*
 6. *"[52] I now dealt with the issue of intent. I need to look at the evidence to see what the intent of the accused was at the time that an object was used to cut him at the neck. The neck is in fact a delicate part of the body with major veins and arteries. The use of any sharp object on that part of the body is indeed serious. Doctor Shirom testified that based on the damage caused, the main blood vessels had not been damaged otherwise the patient would not have made it. He added that "the cut was indeed enough to reach the blood vessels in the neck" (sic). That suggests the severity of the act. Why would the accused who were beating Damien and the latter not retaliating and who was unarmed decide to get a sharp object and cause injury to his neck if not to cause grievous harm [...]"*
 7. *"[53] Section 4, the interpretation of the Penal Code describes grievous harm inter alia as any injury likely to injure health. The injuries inflicted on Damien was indeed likely to injure health, particularly had he not been attended by doctors. I also note that under section 219 (a) the charge would be made out solely if there was unlawful wounding. I find that the charge has been proved by the Prosecution".*
 8. *[54] Therefore, I find the first and second accused guilty of the charged under section 219 (a) and convict them accordingly." Verbatim*
8. The First Appellant has challenged the conviction and sentence on the following amended grounds of appeal —

"2. Grounds of Appeal

1. *The learned trial judge erred in law and on the facts to have concluded that the 1st Appellant had unlawfully assaulted, wounded, and caused the injuries to Damien Pierre, in the absence of conclusive evidence to prove these findings.*
2. *The learned trial judge erred in law and on the facts in failing to sufficiently or at all to assess the entirety of the evidence before him and to consider the entirety of the 1st Appellant's evidence on record before him, which evidence clearly shows that lurking doubts existed as to the perpetrator of the alleged injuries sustained by Damien Pierre, in the circumstances of this case.*
5. *The learned trial Judge erred in law in admitting the video evidence, in that there was no evidence to establish that the original video recording and video of the incident satisfied the conditions set out under section 15 of the Evidence Act.*
6. *The learned trial judge erred in law and on the evidence in convicting the 1st Appellant of the offence of unlawful wounding with intent to cause grievous harm contrary to section 219 (a) of the Penal Code on the basis of having a common intention with the 2nd Appellant, in that the decision cannot be supported by the evidence.*
7. *The Learned trial judge erred in law and on the facts in that the sentence meted out against the Appellant was harsh, oppressive or manifestly excessive.*
8. *The sentence is bad in law for being wrong in principle and goes contrary to sentencing patterns for similar convictions. "*
9. Counsel for the First Appellant in his written submissions submitted on behalf of the First Appellant abandoned the third and fourth grounds of appeal. He adopted the arguments advanced in respect of the first ground of appeal for the purpose of the second ground appeal.
10. The Second Appellant has challenged the conviction and sentence on the following amended grounds of appeal —

"2. Grounds of Appeal

- (1) *The Learned Trial Judge erred in law in admitting and relying on the video adduced by the Respondent [as Exhibit P5] (the "Video") in the absence of any evidence to show its source and creator, contrary to section 15 of the Evidence Act.*
- (2) *The Learned Trial Judge erred in law and on the facts to have concluded at paragraph 31 of the judgment that it was his belief that the Second Appellant was the one who slashed the neck of the complainant in the absence of evidence for the same.*
- (3) *The Learned Trial Judge erred in law and on the facts by concluding, in the absence of any real evidence, that blood could be seen in the Video and that this emanated from the complainant and was as a result of the actions of the Second Appellant.*
- (5) *The sentence of the Second Appellant is bad in law and wrong in principle, being that it is harsh, oppressive and manifestly excessive when considering all the circumstances of the case".*

11. Counsel for the Second Appellant in his written submissions submitted on behalf of the Second Appellant abandoned the fourth ground of appeal.

The evidence for the Prosecution

12. The following material evidence was adduced by the Prosecution at the trial.

13. Mr Damien Pierre, PW14, told the learned Judge that "*[he] ha[s] prayed a lot recently and to god and for [his] religion belief [he] believes that [he] so not want to proceed with the case. [He] want[s] to give any evidence and [he] do[es] not want to say anything more*". Verbatim. The learned Judge said the following before discharging Mr Damien Pierre

—

"COURT TO WITNESS

Q. Okay Mr. Pierre I have taken into consideration the reasons you have given for not wanting to give evidence and I take note of the fact that it is because you feel that you want to forgive and you want to carry on with life and it is also for your religious belief and I do believe that these are sufficient reason for you not to give evidence and therefore I will discharge you."

14. Mr Ange Valentin, PW3, a police officer, working at the Mont Fleuri Police Station, was on duty on the 1 November 2017. On that day, he examined Mr Damien Pierre, who had sustained injuries to the right side of his neck, his arm, the right side of his head and a few other places on his body. Mr Damien Pierre allegedly suffered those injuries at the discotheque, *"Fire and Ice"*.
15. On the 1 November 2017, at 6: 10 am, PW2, Dr Shirom, a senior medical doctor at the Emergency Unit of the Seychelles Hospital, examined Mr Damien Pierre, aged 21. Mr Damien Pierre complained of having been assaulted. The report of PW2's examination, dated the 1 November 2017, was admitted in evidence as exhibit P2. The medical report, exhibit P2, recorded that Mr Damien Pierre —

"[...] had laceration to the back of the head, to the right ear, right side of the neck, right thumb, right side of the chest and there was bruises on the arm, bruises on the left side of the abdomen and also there was another laceration on the back of the neck".

The injuries were caused by a sharp object and also a blunt object. Dr Shirom put twenty-eight stitches in total on the wounds. The neck injury was not *"too deep to involve the aorta and the vena cava of the main vessels inside"*. After that, Mr Damien Pierre was seen by the surgeon and later discharged.

16. When cross-examined by Mr Juliette for the First Accused (the First Appellant now), Dr Shirom stated that the lacerations ranged from half a centimetre to twelve centimetres and were caused by a sharp object. He reiterated that the neck injury had not damaged the main blood vessels inside.
17. Dr Joshua Gopal, PW10, is a medical officer in the Department of Surgery of the Health Care Agency, since November 2016. He tendered a medical report relating to Mr Damien Pierre, dated the 6 November 2017, which was prepared and signed by Dr Constantine,

exhibit P6. Dr Gopal and Dr Constantine were part of the surgical team, who examined Mr Damien Pierre the next day. The medical report, exhibit P6, recorded as follows —

"[...]

REF: Damien Pierre. DOB: 12-10-1996. ADDRESS: Roche Caiman.

The above named patient was reviewed by surgeon on call on 1st November 2017, on Emergency Unit, after referral from Casualty Doctor. He had a history of alleged assault, with multiple laceration (back of head, right ear, and right side of neck, right thumb, and right chest). He had no vomiting, no ENT bleeding, no SOB

On examination he was fully awake, Pulse 116, BP 156/77, SPO2 96%, GCS 15/15. In emergency unit was sutured, and medicated and sent to home.

The same day morning at home, he complained of bleeding from sutured neck laceration and came back to A/E, casualty Dr reviewed but no active bleeding, and called the surgeon on call, who reviewed the patient too, and confirmed no active bleeding, and admitted the patient for observation.

At this moment patient was stable, BP 172/75. Pulse 110, SPO2 98. HB 15.6g/Dl. Same day at night he was reviewed by surgeon on call and was stable, no active bleeding.

Patient improved well and he was discharged on 03/11/2017." Verbatim

18. Upon cross-examination by Mr Anthony Juliette, Dr Gopal, PW10, reiterated that Mr Damien Pierre was discharged from hospital on the 3 November 2017, as there was no bleeding and he was in stable condition.
19. Mr Gaetan Pierre, PW11, is the father of Mr Damien Pierre. He testified that he received a call in the morning, following which he went to the hospital where he saw his son. The bruises suffered by his son had already been sutured. After that, he went to the police station concerning the video footage he had received on his phone via WhatsApp. The Inspector took him to the CID department, where they took his phone for extracting the video footage. After that, they gave him back his phone.

20. The video footage, exhibit P5, was viewed during Mr Pierre's testimony, who gave the following evidence about what he saw on the video —

"A There is my son standing with his hand lifted.

Q. Is it the one without shirt Sir?

A Yes, without shirt.

[...]

Q That's your son.

A I recognise the one who was on the bar, its Jolicoeur, and this one is Jonathan hitting him my son is there on the floor and Jonathan is hitting him with a bottle. You see kicking him Jonathan in the same short that he is wearing. I think so.

Q Whom Jonathan was kicking Sir?

A Jonathan is hitting Damien with a bottle and then – well I don't know really their names but I know Jonathan, I know Jolicoeur, I know Rashid and I know Mangroo.

Q How do you know them Sir?

A Well I am Seychellois I saw them every time".

21. He testified that the video footage was the same video he had received via WhatsApp.
22. When cross-examined by Mr Juliette, whose cross-examination was adopted by all Counsel, PW11 stated that the video footage came from social media. PW11 did not know the person who sent the video footage to him on the 3 November 2017. That person got the video footage from social media. PW11 denied tampering with the video footage. He took the video footage to the police four days after having received it as he was looking for the person who had sent it to him. Later in the proceedings, he stated that he received the video footage from a friend who wanted to remain anonymous. His friend did not film or record the incident. PW11 did not have any knowledge as to how the video was recorded and who recorded it.

23. Inspector Marcus Jean, PW9, the Mont Fleuri Police Station Commander, testified that on the 7 November 2017, PW11 came to the Mont Fleuri Police Station, where PW11 told him that someone had sent him a video, which concerned his son's case, Mr Damien Pierre. After that, they proceeded to the CID Office at the Mont Fleuri Police Station, where they met PW12, the investigating officer. PW11 showed him the video on a black iPhone, which they viewed. The iPhone belonged to PW11. PW12 seized the iPhone at the SS&CRB.
24. The video footage was viewed during the testimony of Inspector Marcus Jean, PW9. He gave evidence about what he saw on the video as follows —

*"Q Explain as the video is being played, can you see it clearly Sir?
A Yes, I can see.*

[...]

*Q Tell us what you can see?
A I can see Mr. Jonathan in the black shirt and trousers who was trying to kick I don't know who exactly who at this point of time.*

Mr Juliette: He can only identify, now he is making opinion about what is happening, just identify the person.

A Yes, I can see Jonathan.

[...]

A I can identify Jonathan your Lordship.

*Q What is he doing now?
A Kicking and now he is, they are in a fight and just now you can see at that point I know him by the nick-name because from the case they called him "gorgeous" but his real name is Shannon, yes, nick-name "gorgeous" name Shannon.*

*Q Also in the video.
A Also in the video, yes.*

*Q Can you tell us among these people where he is?
A Shannon is the one standing in the pink t-shirt.*

[...]

Mrs Amesbury: I don't see the colour of the t-shirt.

Court: I think it's pink, but it could be the reflection of the lights.

A: Yes, because there was lots of light. Now this is the face but I did not identify him since at that point of time I'm not the investigator and so I didn't know if he was involved from that one.

Q: Whom you saw?

A: Mr Mangroo that's the last person in the right t-shirt." Verbatim

25. When cross-examined by Mr Anthony Juilette, PW9 testified that PW11 told him that he had received the video footage over WhatsApp. Since PW9 was not the investigating officer, he did not bother to find out who had sent the video via WhatsApp.
26. WPC Dinfa Ally, PW12, stated that, on the 7 November 2017, PW11 gave her a phone at the CID Office at Mont Fleuri, in the presence of PW9. She proceeded to the digital forensic division at once, where she gave the phone to PW8 to extract the video footage from the phone. After PW8 had completed the procedure, she returned the iPhone to PW11. She did not tamper with the video. After having watched the video, she testified that "*it's the same*".
27. When cross-examined by Mr Juliette, PW12 testified that PW11 did not tell her from whom he had received the video footage. Then she testified that PW11 said to her that he received the video via social media, but she forgot to put it in her statement. She did not attend the scene of the incident. The police officers who attended the scene of the incident on the 1 November at 5:36 and the 2 November at 15:36, retrieved nothing.
28. The extracts between Counsel for the First Appellant (the First Accused then) and PW12 concerning what she had viewed on the video is pertinent —

"Q You viewed the video in some detail, right?

A Yes.

Q While looking at the video, did you see any knife, any pen knife, and any weapon, and show me where it is?

A Witness did not reply.

Q When you look at the video, do you see a number of people?

A Yes

Q So did I, and most of these people you could see their hands, could you?

A Yes.

Q So did I, and most of these people you could see their hands, could you?

A Yes.

Q Is there a knife anywhere in there, or pen knife?

A I couldn't see, no.

Q Is the pen knife anywhere in there?

A No.

Mr Juliette: Thank you officer

Q When you look at the video what do you see on the floor where the thing was happening there, you want to look again?

A Yes.

Q Look again.

A I saw Damien being kicked

Q That's it. I told you to look at the floor, but you see people –

A Yes, on the floor.

Q That is what you see on the floor that is the only thing you see on the floor people kicking Damien, that is what you see?

A And a dust bin fall down and rubbish.

Q And the dust bin of rubbish, that's it.

A Yes.

Q Now when you look at the video where you see kicking Damien on the floor like you said.

A Yes

Q *There is nothing on the floor and then the people tend to appear to be going to the left of the screen, did you see that?*

A *Yes, I see that.*

Q *Where does that lead to?*

A *While those people are using these side.*

Q *Yes, what does that lead to?*

Court: *Why don't you get your question Mr Juliette?*

Q *Where in the video when at that point and time you see people going to the left of the screen?*

A *I don't know.*

Q *Did you bother to find out?*

A *But I think that Damien was going on this side was trying to run.*

Q *Where does it go, where does it end? I went out at night to that place to look and you didn't bother to go and look as the investigating officer?*

A *To go at the place one night.*

Q *Did you ever look at the place and tell me where it leads to?*

A *But the place is quite large.*

Q *So you will know it leads to that largeness of the place.*

A *This was from the bar to the dance floor they were coming from the bar to the dance floor.*

Q *See look at the left of the video after this kicking and punching there. Now you see where it's going there, tell me that direction where does it go to, an outside in the house in a kitchen in toilet tell us where it goes?*

A *In open place like a dance floor.*

Q *It goes in an open place back in the-*

A *Yes, but it was still inside.*

Q *But in the restaurant discotheque whatever you want to call it, inside, okay?*

A *Yes." Verbatim*

29. PW12 testified that the incident did not take 50 seconds. According to her investigation, the incident started very early on the road at the "BoardWalk" and continued to a point at the "Fire and Ice" in the early morning.
30. Inspector Ivan Esparon, PW8, the expert witness, attached to the Digital Forensic Division of the Seychelles Police Force, has been in the Police Force of Seychelles for eleven years. PW8 works in the digital forensics field. He "extracts evidence from digital devices such as mobile phone, GPS, footage, CCTV camera and also computer".
31. On the 7 November 2017, WPC Dinfa Ally, PW12, handed him a black silver iPhone 6. PW12 showed him video footage on the iPhone, which she asked him to extract. PW12 told him that the video footage concerned a case of wounding, which allegedly occurred at the "Fire and Ice Discotheque". PW8 extracted the video footage from the iPhone using forensic software. The video footage was backed up on the forensic computer. After that, the video footage was transferred to a CD. He drew up a report of the extraction of the video, "Digital Forensic Examination", which was admitted as exhibit P3. He gave the CD and the report of the extraction of the video to the investigating officer.
32. The CD was viewed during the testimony of PW8. Upon examination-in-chief, PW8 gave evidence about what he saw on the video as follows —

"WITNESS CONTINUES

A: You see a guy trying to come on top of the bar. Now you can see someone on the floor, he is getting beaten up by some other guy. They are still fighting with the guy on the floor. Now it looks they are going to another direction.

[...]

Mr THATCHETT CONTINUES:

[...]

Q: Having a total duration of 50 seconds I believe?

A: Yes it is 50 seconds.

Q: *Can you explain now what is being shown?*

A: *It looks like near a bar, there is a person there standing. There are people shouting.*

Mr Thachett: *Can it be played on slow motion.*

MR. THATCHETT CONTINUES:

Q: *Can you explain what is there?*

A: *There is a guy climbing on top of the bar. Now someone is trying to pull him back. I can see some people. Now you see a guy kicking another guy on the floor.*

[...]

MR. THATCHETT CONTINUES:

Q: *What is now happening, sir?*

A: *I can see two guys beating up another guy on the floor."*

33. Mr Juliette questioned PW8 concerning the authenticity of the video footage. PW8 testified that there was no evidence that the phone from which the video was extracted, was the device used to capture the footage. PW8 also stated that he could not ascertain the creation date of the video nor the date and time that it was received on the phone of PW11.
34. Mr Gervais Way-Hive, PW13, testified that Mr Damien Piere is a very close friend of his. On Tuesday the 31 October 2017, they went out for Halloween. Mr Rashid Lafleur came over to the table. Then Mr Rashid Lafleur called Mr Damien Pierre to talk to him. He then started swearing at him. Mr Damien Pierre wanted to talk to him, but he [PW13] stopped him. Soon after, a fight broke out. He told Mr Damien Pierre to move away from "Boardwalk".
35. They left "Boardwalk" and moved to "Fire and Ice". Sometime after that the whole group came to "Fire and Ice" – Mr Shane Mangroo, Mr Rashid Lafleur, Mr Brandon Jolicoeur, and the First and Second Appellants. They remained at "Fire and Ice" the whole night. They were dancing on the dance floor when Mr Shane Mangroo came to them. After that, they all came and started arguing. His father, who was there that night, came and told them that there was no need for all this, and that they had to stop. At that point bottles

were being thrown around. PW3 testified to the effect that so many bottles were being thrown around that he could not see all of them. His father was hit with a bottle and required stitches. He was hit on the head with a bucket. Because so many bottles were being thrown around, security was called. He was taken to the kitchen along with his parents and friends so as not to get hurt. Mr Damien Pierre was left by himself outside.

36. When they emerged from the kitchen a few minutes after 5 a:m, everybody had already left. They saw blood on the floor. They tried calling Mr Damien Pierre, who could not be reached. A couple of minutes later they were informed by the aunt of Mr Damien Pierre, who rang them, that Mr Damien Pierre was at the hospital. He proceeded to the hospital to see Mr Damien Pierre.
37. Upon cross-examination by Mr Juliette, PW13 stated that he did not witness any fight between any of the accused persons and Mr Damien Pierre. He viewed the fight on the video evidence. He stated that he was certain that he saw blood on the floor, but he did not know whose it was.

The relevant provisions of the written law

38. Section 5 of the Penal Code (Cap 158) which defines certain expressions and terms, defines "*grievous harm*" and "*harm*" as follows —

"grievous harm" means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement or to any permanent or serious injury to any external or internal organ, membrane or sense;"

and

"harm" means any bodily hurt, disease or disorder whether permanent or temporary;"

The discussion

Grounds 1 and 2 of the grounds of appeal of the First Appellant and grounds 2 and 3 of the grounds of appeal of the Second Appellant

39. Grounds 1 and 2 of the grounds of appeal of the First Appellant and grounds 2 and 3 of the grounds of Appeal of the Second Appellant may conveniently be dealt with together. These grounds challenged the irresistible inference drawn from the circumstantial evidence by the learned Judge as to the guilt of the First and Second Appellants.
40. I read from *Adrian Keane & Paul McKeown The Modern Law of Evidence Twelve Edition* at p. 14 on circumstantial evidence —

"Circumstantial evidence

General

Circumstantial evidence has already been defined as evidence of relevant facts (facts from which the existence or non-existence of a fact in issue may be inferred) and contrasted with "direct evidence", a term which is used to mean testimony relating to facts in issue of which a witness has or claims to have personal or first-hand knowledge. Circumstantial evidence may take the form of oral or documentary evidence (including admissible hearsay) or real evidence.

'It is no derogation of evidence to say that it is circumstantial. [R v Taylor, Weaver and Donovan (1928) 21 Cr App R 20, CA]. Circumstantial evidence is particularly powerful when it proves a variety of different facts all of which point to the same conclusion [...]. Circumstantial evidence, it has been said, works by cumulatively, in geometrical progression, eliminating other possibilities [Per Lord Simon in [DPP v Kilbourne [1973] AC 729, HL at 758] and has been likened to a rope comprised of several cords:

One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence — there may be a combination of circumstances, no one which raise a reasonable conviction or more than a mere suspicion; but the three taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of [Per Pollock CB in R v Exall (1866) 4 F&-F 922 at 929]."

41. In the case of *Teper v Queen [1952] AC 480* at p. 489, Lord Normand delivering the reasons of their Lordships for allowing the appeal, stated the following about circumstantial evidence —

"Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another [...]. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

42. Mr Hoareau and Mr Chang-Leng contended in their skeleton heads of argument on behalf of the First and Second Appellants, respectively, that because the video evidence did not depict the whole incident, from start to end (the video being 50-second footage only), the learned Judge ought not to have relied on the video to come to the "*belief*" that it was the Second Appellant who inflicted the wounds on Mr Damien Pierre. In furtherance of that submission, Mr Hoareau and Mr Chang-Leng further submitted that the learned Judge was wrong to rely on the video to hold that the Prosecution had proven its case beyond a reasonable doubt as that video evidence did not establish the circumstances in which the laceration to the neck of Mr Damien Pierre was caused. Counsel for the First Appellant added that although circumstantial evidence may sometimes be conclusive, it must always be narrowly examined, see **Teper**, *supra*. He submitted that the fact that the video evidence failed to depict the whole incident meant that the learned Judge could not be sure that there were no other co-existing circumstances which could weaken or destroy the inference that the learned Judge had made from the video evidence.
43. Counsel for the Prosecution in his skeleton heads of argument essentially submitted that the findings and conclusions of the learned Judge were supported by the evidence on record including the undisputed video evidence.
44. In this case, Mr Damien Pierre did not give evidence at the hearing. None of the witnesses who gave evidence at the hearing testified to having witnessed Mr Damien Pierre sustaining the injuries recorded in the medical reports, exhibits P2 and P6. A close reading of the record of proceedings revealed that there was no direct evidence of the

wound being inflicted, how this was done, by who and also as to what object was used to inflict such wound. The judgment of the learned Judge revealed that the only evidence of the assault on Mr Damien Pierre was the video evidence. The learned Judge stated at paragraph [8] of his judgment —

"[8] [T]he most compelling piece of evidence being relied upon by the Prosecution is a video recording of the incident".

45. It is also pertinent to note that the video evidence did not reveal the exact circumstances in which Mr Damien Pierre sustained the injuries recorded in the medical reports, exhibits P2 and P6. At paragraph 31 of his judgment, the learned Judge referring to the video evidence observed —

*"[31] Thereafter, the first and second accused charged on the complainant. They launched a ferocious and gratuitous attack on him. He was only trying to get away from them. He was being hit and kicked. Damien tried to escape but the accused kept beating him up and he came to a corner where the first accused continue to brutally assault him and at that point the second accused seemed to look around for something. He returned to join in the merciless attack and that is when blood is seen spilling all over the floor. **It is my belief that it was the second accused that slashed the complainant's neck. Once that happened the complainant managed to escape**".* Emphasis supplied

46. In addition, the learned Judge observed at paragraph 49 of his judgment —

"[49] The assault ended when Damien had his neck slashed and blood could be seen spurting all the floor".

47. The video evidence, 50-second footage, was viewed twice at the appeal. Having considered the video evidence carefully, it is unclear as to how the learned Judge could have come to the finding that blood was seen "*spurting all the floor*". I agree with Mr Hoareau and Mr Chang-Leng that the video evidence does not show blood "*spurting all the floor*". It is also unclear as to how the learned Judge could have come to the finding that blood could be seen from the video without the aid and assistance of an expert. As pointed out by Counsel for the First Appellant, after the video evidence had been produced, a medical expert, Doctor Joshua, PW10, was called to testify and yet no

question was put to him as to whether or not the presence of blood could be seen from the video evidence by the learned Judge or by all Counsel.

48. As regards the assault as observed on the video recording, the evidence by the Prosecution at the trial did not establish that any of the accused person could be seen in possession of a knife or any object which could have caused the wound or laceration. It also did not establish the wound being inflicted. None of the witnesses, as correctly pointed out by Mr Hoareau and Mr Chang-Leng, who viewed the video and testified about their observations gave testimony that they observed a weapon in possession of the First and Second Appellants. Nor of the wound being inflicted. Thus, it is unclear as to how the trial court could have come to the findings that it did in this regard.
49. It cannot also be ignored that the learned Judge at paragraphs [34] and [50] of his judgment, [paragraph [7] op. cit], accepted that bottles were being thrown and not solely by Mr Damien Pierre. Mr Damien Pierre was shirtless in the 50-second video evidence. The video evidence showed Mr Damien Pierre being hit and kicked on the floor. According to the medical report, exhibit P2, Mr Damien Pierre had sustained injuries (lacerations) to the right side of his neck – 12 centimetres, to the right ear – 1 centimetre, to the back of the neck – 1 centimetre, to the right thumb – 1 centimetre, to the chest – 1 centimetre. The Learned Judge did not consider these other injuries, which was before him in the form of exhibits P2 and P6. The source of those injuries have remained unexplained, and the only inferences drawn by the learned Judge were in relation to the laceration sustained on Mr Damien Pierre's neck. These inferences he drew from his observations of the video, which observations are in sharp contrast with the observations of the various witnesses who testified on what they saw in the video. As mentioned above, not a single one of the Prosecution's witnesses testified that either of the Appellants or any other accused person, was in possession of a knife or an object.
50. Further, the learned Judge made the observation, in his judgment, that the Second Appellant could be seen retrieving from the attack on Mr Damien Pierre for a brief

moment and that after his return, blood could be seen "*spurting all the floor*". From this, he draws the inference that the Second Appellant inflicted the cut to the neck. Despite a clear lack of evidence on the part of the Prosecution, that this was the course of events, but on the basis of his "*belief*" that that was how Mr Damien Pierre had sustained the laceration to his neck. This is, without a doubt an error on his part. Based on the evidence that there were bottles thrown, which evidence was accepted by the learned Judge, the inference could be drawn that Mr Damien Pierre could have gotten the cut to his neck through a piece of broken bottle found on the floor while he was on the floor being hit and kicked.

51. I add that, Doctor Shirom, PW2, testified to the effect that the neck injury had not damaged the main blood vessels inside; the neck injury was not "*too deep to involve the aorta and the vena cava of the main vessels inside*". Further, Dr Gopal, PW10, testified to the effect that Mr Damien Pierre was discharged from the hospital on the 1 November 2017 in the morning, but returned to the hospital later that day, complaining that the stitched laceration to his neck was bleeding. He was discharged on the 3 November 2017, as the stitched laceration to his neck was not bleeding and he was in stable condition. It is unclear as to whether or not the injuries suffered by Mr Damien Pierre are consistent with the "*merciless attack*" and "*ferocious and gratuitous attack*", which the learned Judge stated to have been inflicted on Mr Damien Pierre. The learned judge did not address his mind at all to this issue.
52. In light of the above, not only does the entirety of the evidence shows that lurking doubts existed as to the perpetrator of the alleged injuries sustained by Mr Damien Pierre, in the circumstances of the case, but the totality of the evidence shows that lurking doubts also existed as to whether the lacerations had indeed been caused by any of the accused persons.
53. Before me, I have only circumstantial evidence. As rightly submitted by Mr Hoareau and Mr Chang-Leng, the learned Judge, before drawing any inference as to the guilt of the

First and Second Appellants from circumstantial evidence, had to be sure that there were no other co-existing circumstances which could weaken or destroy the inference. I hold the view that the circumstantial evidence, in this case, falls short of conclusiveness.

54. For the reasons stated above, I accept the contentions contained in grounds 1 and 2 of the grounds of appeal of the First Appellant and grounds 2 and 3 of the grounds of appeal of the Second Appellant. I allow these grounds of appeal.

Ground 5 of the grounds of appeal of the First Appellant and ground 1 of the grounds of appeal of the Second Appellant

55. Ground 5 of the grounds of appeal of the First Appellant and ground 1 of the grounds of appeal of the Second Appellant are contesting the admissibility of the video footage as an exhibit.
56. Mr Hoareau and Mr Chang-Leng submitted that it was imperative for the Prosecution to comply with section 15 (1) of the Evidence Act, especially with section 15 (1) (c), not only in respect of the iPhone of Mr Gaetan Pierre, PW11, but more importantly in respect of the electronic device, be it a phone or otherwise, which was used to originally record the video. Counsel for the First Appellant submitted that the Prosecution failed miserably to comply with section 15 (1) in that —
- (i) it never adduced any evidence in respect of the original recording of the video. There was not one iota of evidence as to how the video was recorded, what electronic device was used to record the video and who recorded that video;
 - (ii) there was no evidence before the Supreme Court to establish that the device which was used to record the original video had indeed satisfied section 15 (1) (c) of the Evidence Act; and
 - (iii) therefore, the possibility that the video evidence had been tampered with or altered prior to being sent to Mr Gaetan Pierre, PW11, could not be excluded.

57. Counsel for the Prosecution submitted in his skeleton heads of argument that the First and Second Appellants were precluded from contesting the admissibility of the video evidence as an exhibit because they did not challenge its admissibility at the trial in the Supreme Court. He also submitted that section 31 (b)¹ of the Evidence Act permits the production of a copy of a document or a material part of it. He added that Inspector Esparon, PW8, had testified to the effect that the video evidence had not been tampered with nor modified. He also submitted that the reliance of the First and Second Appellants on the video evidence before the Supreme Court and at the appeal proved that no prejudice had been caused to the First and Second Appellants.

58. Section 15 (1) of the Evidence Act provides —

"15 (1) 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 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*

¹"31 Where in a trial a statement contained in a document is admissible in evidence under section 14, section 15, section 29 or section 30 it may be proved -

(a) by the production of that document, or

(b) whether or not that document is still in existence, by the production of a copy of that document, or of the material part of it, authenticated in such manner as the court may approve".

production of the document or the accuracy of its contents".

59. Section 2 of the Evidence Act defines document, *inter alia*, as including —
- "(d) any film, negative, tape or other devices in which one or more visual images are embodied so as to be capable, with or without the aid of some other equipment, of being reproduced therefrom".*
60. I have considered the contentions contained in these two grounds of appeal and the submissions of Mr Hoareau and Mr Chang-Leng and the Prosecution with care. In this case, it is clear that the video evidence was inadmissible as an exhibit at the trial and should have been excluded by the learned Judge. It follows, therefore, that the contentions of Counsel for the Prosecution contained in his written submissions are misconceived for the reasons stated below. Hence, these two grounds of appeal have merits and I allow them.
61. The video evidence was recorded by the use of an electronic device, be it a phone or other device. Therefore, the video was recorded by a "*computer*" in accordance with the definition of section 15 (1) (a) of the Evidence Act. Also in accordance with the definition of the term "*statement*", the visual representation as contained in the video is a statement. It is also clear that pursuant to section 2 (d) of the definition of the term document, the storage of the video footage is embodied in a "*document*".
62. In the case of *Nenesse v R SCA CR No. 35/2013 [2016] SCCA 23*, the Court of Appeal stated: "[13] [s]urveillance video evidence from CCTV cameras is admissible under section 15 (1) of the Evidence Act". *Nenesse, supra*, quoted, with approval the South African case of *S v Ramgobin & Anors 1986 [4] SA 117 (N)* to the effect that for video tape recording 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*".

63. Counsel for the First Appellant elaborated on his ground 5 that the learned Judge ought to have conducted a *voire dire* prior to admitting the video in evidence taking into account the factors concerning the video evidence in this case —
- (i) the video was extracted from the iPhone of Gaetan Pierre, PW11, the father of Damien Pierre.
 - (ii) Gaetan Pierre, (PW11), was sent the video by a person on WhatsApp on 3 November 2017 and he handed over his phone so as to extract the video on the 7 November 2017. The person who sent him the video wanted to remain anonymous. Moreover, the person who sent him the video was not the person who filmed or recorded the incident. PW11 did not have any knowledge as to how the video was recorded and who recorded it.
 - (iii) Gaetan Pierre handed over his iPhone to Inspector Marcus Jean, PW9, on the 7 November 2017. The phone was after that handed over to the investigation officer Dinfa Ally, PW12.
 - (iv) Dinfa Ally, PW12, after receiving the iPhone handed it over to Inspector Ivan Esparon, PW8.
 - (v) Ivan Esparon, PW8, testified that the video evidence was for a total duration of 50 seconds. According to the evidence of Inspector Esparon, PW8, there was no evidence that the phone from which the video was extracted was the phone used to capture the footage. He stated that he could not ascertain the creation date of the video nor the date and time that it was received on the phone of Mr Gaetan Pierre, PW11. Inspector Esparon, PW8, also stated that the duration of the video could have been longer, and that the start or the end of the video could have been removed.
64. The evidence, in this case, revealed that the provenance and history of the video recording were not established by the Prosecution and the possibility for someone to have interfered with the original video could not, in this case, be excluded. This was clearly admitted by Inspector Ivan Esparon, PW8, in his testimony. The excerpts between Mr Anthony Juliette and Mr Ivan Esparon, PW8, upon cross-examination of PW8, are pertinent —

"Mr Juliette: [...]. I am saying that the video that I was given, it is strange that it has only 50 seconds of it. I am not saying you gave me the wrong one. You gave me the correct one but I am saying over a long incident you bring only 50 seconds worth of the video, so there must be something that something does not add somewhere.

MR. JULIETTE CONTINUES

Q. That is what I am asking you, Sir, you understand the question?

A. You need my opinion?

Mr. Juliette continues:

Q: Go on

A: Well, in my opinion, I look at two ways, there is the possibility that before this video came to the mobile phone may be at the start or end may have been removed or also there is a possibility that person may have only filmed it for 50 seconds.

Q: So two possibilities, one it could have been a legitimate 50-second video, fair enough, the second possibility it could have been a longer video but somebody because it was not on that phone It was not originally on that phone that you received, so it possible that somebody could have played with it and given you the 50-second extraction. There you are Mr. Police, that is a possibility, right?

A: It is a possibility." Emphasis supplied

65. In light of the above, I accept the submission of Mr Hoareau and Mr Chang-Leng that the learned Judge was wrong in this case to refer to section 15 of the Evidence Act in his judgment solely with respect to the video evidence as recorded on the phone of Mr Gaetan Pierre, PW11, but failed to address his mind in respect of the original recording of the video.
66. In the case of *R v Stevenson R v Hulse R v Whitney [1971] 1 WLR 1* referred to us by Counsel for the First Appellant, Kilner Brown J conducted a lengthy *voire dire* to determine whether or not to admit electronic tape recording of human voices. Kilner Brown J stated —
- "Reg. v Masqud Ali [1966] 1 Q.B. 688 is in point on the question of tape-recorded evidence. Certain passages in the judgment of the court clearly indicate that, when dealing with this type of evidence, particular care is required and contemplate that issues of truth or falsity may in some instances have to be considered as matters of*

admissibility. Moreover, in the most recent case of *Reg. v. Senat* (1968)52 CR. App.R. 282, while approving the admission of tape-recorded evidence, Lord Parker C.J. would appear to have kept open the issue where recordings been tampered with or may have been wrongly transcribed. **Consequently, in this case, an extremely lengthy and detailed examination of the evidence has taken place upon the *voire-dire*. This examination has been conducted with great care. It has been highly technical and very scientific at times and extremely burdensome for everybody engaged in this case. I interpolate to say that I have been greatly assisted by the way in which this examination has taken place, greatly assisted by those who had the technical duty of producing it, to those who have given evidence and to counsel who have probed that evidence before me**".

67. At the end of the *voire dire* Kilner Brown J came to the following conclusion —

"[i]t is, however, quite plain to me that there was opportunity for someone to have interfered with the original, and, putting it at its lowest, there is clear evidence before me that some interference may have taken place". Emphasis supplied

68. In *R v Robson R v Harris* [1972] 1 WLR 651, the Central Criminal Court, presided by Shaw J adopted the approach of Kilner Brown J in *R v Stevenson R v Hulse R v Whitney* [1971] 1 WLR 1. Shaw J stated —

"My own view is that in considering that limited question the Judge is required to do no more than to satisfy himself that a *prima facie* case of originality has been made out by evidence which defines and describes the provenance and history of the recordings up to the moment of production in court". Emphasis supplied

69. In *R v Stevenson R v Hulse R v Whitney* [1971] 1 WLR 1 at p. 3 of his judgment, Kilner Brown J stated —

"I decide this matter on the narrow but vital question as to whether or not the so called original tapes are established as original. [...]. Once the original is impugned and sufficient details as to certain peculiarities in the proffered evidence have been examined in court, and once the situation is reached that it is likely that the proffered evidence is not the original, is not the primary and best evidence, that seems to me to create a situation in which, whether on reasonable doubt or whether on a *prima facie* basis, the judge is left with no alternative but to reject the evidence."

70. For the reasons given above, I allow ground 5 of the grounds of appeal of the First Appellant and ground 1 of the grounds of appeal of the Second Appellant.

71. This is enough to dispose of this appeal.

72. For all the reasons given above, I allow the appeal of the First and Second Appellants. Hence, I quash the conviction and sentence of the First Appellant. I also quash the conviction and sentence of the Second Appellant. I acquit the First and Second Appellants forthwith.

Signed, dated and delivered at Ile du Port on 18 December 2020.

Robinson JA

I concur

I concur

Tibatemwa

Tibatemwa-Ekirikubinza JA

Dingake JA