The Republic v Rene & Ors
(2008) SLR 22

Frank ALLY for the Republic
Pesi PARDIWALLA for the first accused
France BONTE for the second and third accused
The third accused present

Ruling delivered on 22 October 1998 by:

PERERA J: The three accused stand jointly charged with the offence of causing grievous harm, contrary to section 219(a) of the Penal Code, read with section 23 thereof. By a ruling dated 3 July 1998, I have held that this charge is not duplicitous.

Section 219(a) of the Penal Code is as follows –

> Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person –
>
> (a) unlawfully wounds or does any grievous harm to any person by any means whatsoever is guilty of a felony, and is liable to imprisonment for life.

Section 23 provides that –

> When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

At the end of the case for the prosecution, counsel for the first accused, Mr Pardiwalla, and counsel for the second and third Accused, Mr. Bonte, made submissions that there was no case to answer. In summary trials before the Supreme Court and the Magistrates' Court, section 183 of Criminal Procedure Code provides that -

> If at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.

However in the case of jury trials before the Supreme Court, section 249(1) provides that -

> If, when the case for the prosecution has been concluded, the judge rules, as a matter of law, that there is no evidence on which the accused could be convicted, the jury shall, under the direction of the judge, return a verdict of not guilty.

The function of the judge in the two types of cases is different. In summary trials, he is the judge of facts as well as the law. In a jury trial, facts are judged by the jury while the law is decided by the judge. Hence the former is a subjective consideration while the latter is an objective one. In jury trials therefore it would not be the function of the judge to weigh the evidence, decide who is telling the truth and stop the case merely because he thinks the witness is lying. That would be a usurpation of the function of the jury. Hence under section 249(1) a judge may rule "as a matter of law" that the evidence adduced by the prosecution did not establish an essential element in the alleged offence and direct the jury on the law for the acquittal. However in the case of summary trial, the judge can not only consider whether the evidence adduced establishes the ingredients of the offence but also, as a matter of fact whether the prosecution had made out a case against the accused "sufficiently to require him to make a defence". This is not a stage for the judge to weigh the evidence and decide on the truthfulness of witnesses. That should be done after hearing the defence. However the court must be satisfied that there is reliably sufficient evidence to make out a case against the accused as charged.

The East African Court of Appeal in interpreting section 205 of the Criminal Procedure Code of Tanzania (which is the same as our section 183), in the case of *Ramanlal Bhatt v R* [1957] EA332 at 334 stated -

> Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one" which on full consideration might possibly be thought sufficient to sustain a conviction." This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is "some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence". A mere scintilla of defence can never be enough, nor can any amount of worthless discredited evidence.

In this respect, English decisions like *R v Galbraith* (1981) 73 Cr App R 124 which lays down guidelines to be followed in the case of a submission of no case to answer are not helpful as those guidelines apply to trials by jury. In summary trials the prosecution ought to have adduced even minimum evidence to satisfy the court that there is a prima facie case against the accused. If such evidence is available, irrespective of whether certain other witnesses had contradicted each other, the accused will have a case to answer. Witnesses can contradict themselves for a variety of reasons and motives.

What then is the evidence available against the three accused at the end of the prosecution case to satisfy this Court that a case has been made out against them.

The three accused are being charged in one count with committing a single offence with a common intention. Hence the prosecution basically had to adduce evidence that the complainant was wounded as a consequence of the three accused forming a common intention in conjunction with one another.

Section 219(a) of the Penal Code requires proof of an intent to cause grievous bodily harm. In the case of *Assary v R*
(1978) SCAR 464, it was held that such intent could be inferred from the facts of the case. The complainant in his testimony stated that his right eye was punched by the third accused over his spectacles causing a bleeding injury near the eye, close to the bridge of his nose. He further stated that his neck was bruised in an assault which involved all three accused. He also stated that his head was bashed against a cargo container by the first accused, making him dazed momentarily and that while in that state, someone cut the skin of his penis circumferentially. Dr Layo Ayewole (Pw2) described the injury as a "circumferential laceration of the skin" at the base of the penis. He stated that it could have been caused by a sharp object like a knife or a razor blade applied to the skin "with a minimum or moderate force". He agreed in cross-examination that the person who caused that injury could have severed the organ if his intention was to cause grievous injury. That was the doctor's opinion. The Court has to consider that intent upon its own assessment. The doctor ruled out the possibility of an accidental cut in the course of a struggle and said that if that be so there would have been other injuries, and that the circumferential cutting indicated a purposeful Act. He further stated that the cut could have been made by pulling the penis forward. Hence the medical evidence establishes that the injury was caused by a purposeful act. Dr Ayewole further testified that due to the laceration, the fore-skin had moved forward and hence he cleaned and disinfected the area and sutured the injury.

The complainant alleged that his right eye was punched causing an injury. P Sgt Edwin Labrosse (Pw8) who saw him soon after the alleged assault, and SI Maryse Labrosse, who went to his house about 6 hours later testified that they saw the injury. Dr Ayewole stated that he only treated the injury to the penis and did not examine any other part of the body. However for the purposes of the offence under section 219 (a) the most pertinent injury is the one to the penis. The complainant testified that the following day, his penis was swollen and he was in great pain. He could not wear trousers and hence went to the Les Mamelles clinic with a towel wrapped around his waist. From there he was transferred to the Victoria hospital where he was put in a ward. The prosecution did not adduce any other medical evidence to enable this Court to assess the resulting condition of the injury.

In the *Assary* case (supra) the learned Judge sought to draw a distinction between intention and the actual nature of the injury, the whole exercise being to consider the nature of the injury in determining the mental state of the accused. In the case of *Moriarty v Brookes* (1834) 6 Cr & Ph 684 it was held that to constitute a wound, the

continuity of the whole skin must be broken. The medical evidence in the case establishes that the foreskin was separated and that it was sutured. In the *Assary* case (supra) and in the English case of *R v Wheeler* (1884) Cox CC 164, the injuries caused were severe. In the *Wheeler* case, a prisoner struck the prosecutor a blow with his fist which broke the prosecutor's jaw on both sides of his face. In both cases it was held that the intention to cause grievous harm had not been made out and consequently the accused were convicted on a lesser offence.

Where the legislature makes an offence dependant on proof of intention, the court must have proof of facts sufficient to justify it in coming to the conclusion that the intention existed. Here the general presumption of law is that every sane person is presumed to intend the necessary or the natural and probable consequences of his acts. This necessarily involves the inference of intention from the conduct. Thus in a case of wounding, proof of the injury is sufficient. However in a charge under Section 219 (a) of the Penal Code the unlawful wounding or the causing of grievous harm should be done with an intention to maim, disfigure or disable a person. Thus as in *Assary* or *Wheeler*, kicking a leg or punching the face may not attract the inference that the causing of grievous bodily harm was intended. But where as in the instant case, the complainant's trousers and underwear were removed purposely to cut his penis, an intention to cause grievous harm by maiming, disfiguring or disabling him can be safely inferred. The word "maim" means to mutilate or disable, "disfigure" is to distort or disfeature and includes maiming or mutilation and disabling. The medical officer testified that the "dissolving stitches" applied in suturing the skin would have healed in three weeks. But the complainant testified that the wound got septic and that still he has been unable to have sex. Hence prima facie there is evidence sufficient to maintain the ingredients of the offence.

The next consideration would be whether there is sufficient evidence against the three accused that the act of wounding was done by them in pursuance of a common intention. The prosecution did not make any application to treat any of the witnesses as hostile witnesses for purposes of the proceedings. Hence it is open to this Court to believe one or the other. But this is not the proper stage to do so. The evidence of the complainant was consistent with the main facts of the prosecution case. The second and third accused are high ranking police officers and well known to the public. The firstaAccused is also a police constable by rank is the driver of the third accused. The complainant testified that he positively identified the three accused as his assailants that night. He stated that someone shouted "there he is" and the third accused grabbed him by the collar of his t-shirt and dragged him near a container. Then he punched his right eye over his spectacles thereby breaking the lens and injuring his face. The second accused held his hands and the first accused bashed his head against the container. He also stated that all three accused assaulted him. The bashing of the head dazed him momentarily and he fell. But he saw the first accused removing his trousers and underwear and asked him "what are you doing to me". All three accused were struggling with him, so he could not state with certainty as to who actually cut his penis.

There is therefore prima facie evidence that all three accused participated in the assault

on the complainant which culminated in the injury to his penis. The evidence of an eye-witness was that of Bernard Georges Labrosse (Pw9). He testified as to what he saw. He could not see what happened after the complainant fell after being hit against the container. He however saw all the accused in different positions before the alleged assault. That assault took place at a point marked "6" in photo no 2 of the album marked "PI". Pw9 was seated on the bench at Point "1" in photo no 6. On a preliminary assessment of those photographs on the basis of his testimony, it was not possible for him to see whether the second and third accused joined in the assault as was testified by the complainant. He however saw the third accused after the complainant came to the bench where he was seated. That does not necessarily impugn the evidence of the complainant that all the three accused were involved in the assault.

In a criminal case where the offence is one affecting a person, the best evidence is that of the complainant himself. In the instant case, medical evidence establishes that the injury to the complainant's penis had been deliberately inflicted. The photographs in the album marked exhibit PI show the maiming and disfigurement of that organ. The complainant's evidence is consistent as to the identity of the three persons and their joint participation in the assault which resulted in the grievous harm.

It was held in the case of *R v Stiven* (1971) SLR 137 that a submission of no case may be properly be made and upheld

(a) When there has been no evidence to prove an essential element in the alleged offence.

As was seen by the foregoing, the essential elements of intent and causing grievous harm have been established by evidence.

(b) When the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it.

As I stated before, the witnesses may differ in their respective testimonies regarding the same incident for a variety of reasons. The evidence adduced by the prosecution cannot be said to have been discredited by cross-examination nor manifestly unreliable.

The discretion to call upon the accused to make a defence at the end of the prosecution case is entirely with the court. In doing so the court should not consider whether the prosecution evidence is sufficient to convict the accused or is so deficient that they should be acquitted. Such a decision can be made only after hearing the defence. The only consideration at this stage is whether the evidence is such that a reasonable tribunal <u>might,</u> and not necessarily <u>will,</u> convict.

On a consideration of the evidence on the basis of these guidelines, the Court is satisfied that the prosecution has made out a case sufficiently to require the accused to

make a defence. Accordingly there is a case to answer by the first, second and third Accused.

Record: Criminal Side No 28 of 1998