

IN THE SUPREME COURT OF SEYCHELLES

THE REPUBLIC

VERSUS

JOSEPH ANNA

ACCUSED

Criminal Side No 58 of 2004

Mr. R. Govinden Principal State Counsel for the Republic

Mr. A. Julliette Attorney at Law for the Accused

JUDGMENT

Perera J

The Accused stands charged on two counts; count 1 with the offence of attempted murder, contrary to Section 207 (a) of the Penal Code, and Count 2 with the offence of doing an act intended to cause grievous harm, contrary to Section 219(a) thereof.

According to the medical report produced in evidence (P2), the Complainant, Dermoth Felicie was examined in the Casualty Ward of the Victoria Hospital on 1st May 2004 at around 21.00 hours with a penetrating wound of about 10 cm in the left pectoral area, with air escaping from the wound. He was conscious and responding to verbal commands, but was in a state of shock from loss of blood. There was active bleeding inside the thorax. A thoracotomy was performed and a bleeding artery was repaired.

Prosecution Case

The Complainant testified that he had known the Accused for 13-15 years. Both of them consumed alcoholic drinks together occasionally. He told one Regis Felix that the Accused had stated that he will kill him as he had threatened his wife. However Felix took no notice and went away. He denied that he stated that to create problems with those two persons. On 1st May 2004, around 7 p.m., when he was going past a shop called "S.K. Gopal Shopping Centre," he saw Regis Felix talking to the Accused near the wall of that shop. They did not talk to him. One Moller Meme (PW6) who lives opposite the shop called him and gave a bottle of beer and a cigarette. After that he walked towards the shop, but at that time he did not see either the Accused or Regis Felix. However when he came near the step of the shop, the Accused, who was hiding behind the wall of the shop stabbed his stomach with a sharp object, and then went along the road on the left side of that shop. He shouted "*Joe Anna injured me*", and continued to walk along the road in front of the shop, but fell near the shop of one Lindy Laporte. The Complainant stated that he told Wendy, her daughter who came there, that the Accused injured him. He further stated that at the hospital, he told the doctor who examined him that it was the Accused who stabbed him. The Complainant admitted that he was an alcoholic, but denied harassing anyone. He also stated that he was not under the influence of liquor at the time of the incident.

On being cross examined, he stated that although he wanted to buy cigarettes from the Gopal shop, he found it closed upon coming near the step. He denied seeing one Mike Robert Barbe or telling him that it was a "*fair boy*" who stabbed him. He stated that Wendy Laporte would testify that he stated Joe Anna stabbed him. He however admitted that two "*fair boys*" were seated on the wall opposite Moller Meme's house. They were one Jimmy Sinon and his cousin Reno Annette. He denied that anyone of them attacked him. He further stated that both of them were seated on the wall after he was injured, but did not want to assist him,

although Jimmy Sinon alone came up to help him. The Complainant further stated that his mother Leona Bristol and his sister Sultanne Bonne did not want him to involve the accused Joseph Anna. The evidence of Regis Felix was not adduced by the Prosecution as he had been in the Court Room when the Complainant was testifying. The Court discharged him to ensure a fair trial.

Wendy Laporte corroborated the Complainant and stated that she saw him staggering along the road with a bleeding wound. Some people came to help him, but he fell on the road. She telephoned the Police twice, while someone else called the ambulance. She did not see how the Complainant was injured. One Hervey Tangalam asked the Complainant "*who has done this to you*"?

P.C. Hansel Thomas (PW5) who was at the Anse Aux Pins Police Station, arrived at the scene after receiving a telephone call at 8.15 p.m. that night, and found the Complainant bleeding profusely from an injury on the stomach. He was dispatched to hospital. According to exhibit P2, the medical report, the Complainant was examined at the Casualty department around 21.00 hrs. He commenced investigations and noted fresh blood stains on ceramic tiles of the shop wall, the cemented floor near the steps, and the trail of blood from there up to where he found the Complainant fallen. He identified the blood stains in the photographs mounted in the album (P1) as those that he observed during the investigation.

Defence Case

The Accused elected to remain silent, but to call witnesses. No adverse inference is drawn from the exercise of his right. He called seven witnesses. Moller Stanisla Meme (DW1) testified that he gave a statement to the Police on 2nd May 2004, the day after the incident. According to him, he was at his home around 8 p.m. that day. The Complainant, who was known to him was in that area, and told him "*I am going away, be careful of your tools, because I do not want you to tell me that I have stolen your tools*". The witness described the Complainant as a nuisance as he harasses and teases people. So he told him to stop harassing him

and chased him away with a broom. Then he went towards the “Gopal shop”. At that time two “fair boys” were seated on the short wall near the shop. He did not see the Accused near the shop. He went back to his house and did not see or hear anything thereafter until P.C Thomas called him and asked him whether he saw the person who stabbed the Complainant. At that time there was no one in the shop area. He stated that although usually there was a light by the side of the shop, that light was not switched on that day. At best therefore this witness could not have seen anyone hiding behind the wall.

Rolly Asba (Dw2) was returning home after a beach picnic at Baie Lazare. The Picnic was over around 5 p.m. and he was walking up Caryol Estate at Anse Aux Pins before 6 p.m. when he saw the Accused going ahead of him. The Accused told him that he was going to his son Brian Sinon’s place. While continuing their way they met Dona Jean Baptiste (DW3) at his house. They chatted briefly and continued towards the house of the Accused’s son. This witness stated that he is a step son of the Accused, and that he respected him, and liked him. In reply to a question put by the Prosecution he stated –

“Q. Did you know what happened to him eventually, the Accused?

A. Next day I heard people talking, people were talking, but it was not him.

Q. It was not him, what?

A. Yes.

1. You say it is not him, it is not him who did what?

1. When I went home, I left him”

Further questioned by Counsel for the Prosecution, he changed his position

and stated-

“A. People were saying it was not him who has done that, because they were saying he was not there”.

This witness who was able to state that the picnic ended around 5 p.m, declined to give appropriate times as to when he met the Accused and how long he spent with, him on the basis that he had no watch on him. As suggested by the Prosecution, the witness was being partial towards the Accused who was at one time his step father.

Dona Jean Baptiste (DW3) however corroborated Rolly Asba as regards meeting him with the Accused. He stated categorically that they met around 6.30 p.m, as at that time he was listening to the announcements after the news on the radio. The Accused told him that he was going to this son's place. Later five minutes to 7 p.m., he went to his sister's place to get cigarettes, but could not get any. The witness once again fixed the time of his movements to the 7 p.m. English news was telecast over the T.V. Coming from his sister's place he went to his Aunt's place. From there he saw the Accused seated outside his son's house and eating dinner and he asked him for a cigarette and went home. This witness again fixing the time to the 8 p.m. news on the TV stated that while watching the news he saw the Accused passing his house. His son was walking ahead of him. The Accused told him that he was going home.

The witness stated that anyone going to the house of the son of the Accused, had necessarily to pass in front of his house. This was observed by Court during the visit of the locus in quo. Dona also stated that in the vicinity where he lived, all were relatives and that the Accused's son was his cousin. He stated that he did not hear

about the stabbing incident or the arrest of the Accused. He did not know whether the Accused was on remand pending the disposal of this case.

Juan Michel (DW4) testified that past 8 p.m. on 1st May 2004, he was by the roadside at Cayole Estate when the Accused asked him where his son Brian Sinon was. He showed him going down in a P.U.C. vehicle to work. The witness further stated that he did not know from which direction the Accused came. However he saw Brian Sinon coming down and getting into the vehicle. He did not see both the Accused and Brian Sinon together at any time that night, although he was at that same spot for about two hours talking to a friend. He further stated that if the Accused was going down together with Brian Sinon past Dona Jean Baptiste's house to the PUC car he could have seen them. He also stated that the Gopal shop was about 10 minutes walk from where he stood.

Mike Robert Barbe (DW5) testified that he lived at Anse Aux Pins, but at the time of testifying, he was serving a term of imprisonment at Long Island. He gave a statement to the Police on 5th May 2004. Around 8 p.m. on 1st May 2004, he saw the Complainant near a shop close to Gopal's shop where he lay fallen. He asked him for a cigarette and he gave him one. The Complainant was bleeding profusely from the left side of his chest. When asked as to what happened, he replied that a *"fair complex boy had stabbed him"*. The witness then ran away. On the way he saw Jimmy Sinon wearing a shirt stained with blood, and getting into a blue jeep driven by one Terry Laporte and going away. When he first saw Jimmy, he was wiping his hands.

The witness further stated that Jimmy Sinon was Brian Sinon's cousin, and the nephew of Marie Ange Sinon. Questioned by Learned Counsel for the Prosecution whether he knew why the Accused is in Court he stated-

“A. For the offence he has not committed. I saw Jimmy and I did not see the Accused”.

Marie Ange Sinon (DW6), lived in concubinage with the Accused until Brian Sinon was born to her by him. Thereafter they separated, and the witness started another relationship with one Marcel Fred (DW7). She testified that on 1st May 2004 at about 6.35 p.m. when the radio messages and announcements were being made, she saw the Accused and Rolly Asba. The Accused asked for Brian Sinon and she stated that he had gone for a picnic and would return soon. Around 7.45 p.m. she noticed that both the Accused and Brian were not in the house.

Marcel Fred (DW7) testified that he was not in friendly terms with the Accused as he had previously lived with Marie Ange Sinon, and hence there was ill feelings between them. On 1st May 2004 around 6.30 p.m. he parked his pick up near the road going to the area called “Berlin” where Dona Jean Baptiste, Brian Sinon, Ghirliss Laporte, Rolly Asba and he lived with Marie Ange Sinon. He went home, changed clothes and had a bath. He took two bottles of cola to go to the shop, when he saw the Accused sitting on the doorstep of his son. When he returned from the shop about 10 to 15 minutes later, he met the Accused and his son Brian coming down towards the road.

The witness testified that while watching the 8 p.m. news on the television, a man came and told him that someone had been stabbed near Gopal’s shop. He stated that he came to know who was charged in this case only when he came to Court. However the witness contradicted himself and stated that he heard about the case when Counsel for the Accused came to the area to view the scene and to take instructions. He also admitted that he heard about the arrest of the Accused.

As the defence has adduced evidence of an alibi, the case turns on the identification of the Accused as the Assailant, by the sole evidence of the Complainant. There is no requirement in law that the evidence of a single witness as to identity should be corroborated (***R v. Williams (1965) Crim. L.R. 833,*** However I warn myself that the Court must be satisfied that such identification is free from possibility of error and is therefore safe to act upon. I also caution myself that a mistaken witness could be a convincing one.

In the case of ***Padayachy v. R (1978) S.L.R. 144***, the Court upheld the conviction of the Appellant by the Magistrates' Court on the sole evidence of a Police Officer who saw the Accused emerging from a window of a building after stealing, and also saw him on the road by the light of adjoining shops. Further the Police Officer had immediately identified the Accused and shouted his name within the hearing of another Police Officer who was with him. An alibi set up by the Accused was rejected.

In ***Her majesty v. Guy Agathe (Cr. Side 1335 of 1973 – unreported)***, the Accused was convicted by the Magistrates' Court, and committed to the Supreme Court for sentence. The Supreme Court stated thus-

“This Accused has been found guilty on the testimony of a single witness as to identification. In such a case a trial Court should direct itself to the dangers of convicting on the evidence of a single witness as to identification and should look for other evidence, whether circumstantial or direct, pointing to guilt from which it can reasonably conclude that the evidence of identification can safely be accepted as free from the possibility of error. If there is no such additional

evidence pointing guilt, the trial Court may still convict on the evidence of a single witness if it is satisfied that such witness has made no mistake as to the identification”.

In Appeal, to the Seychelles Court of Appeal (S.C.A.R – 1965 – 1976) Page 107, the Court upheld the conviction and the sentence, and held that the Rule that a warning should be given by the Trial Judge as to the dangers of relying upon an identification by a single witness, was only a Rule of Prudence, and that the fact the Judge had not followed it would not invalidate a conviction. – (***Thairu & Ors v. R. (1954) 21. E.A.C.A. 187***).

In the case of ***Roria v. R (1967) E.A.L.R. 583***, the Court of Appeal of Kenya, set aside a conviction based on a single witness who had not know or seen the Accused before, and as the conditions under which that witness thought she saw the Accused during a raid by a bandit gang, were unfavorable to an accurate identification.

In the present case, the Accused was well known to the Complainant. Hence what has to be considered is whether for some reason he could have made an error. ***Ashworth J in the case of R v. Johnson (1961) 3. A.E.R. 969 at 970*** stated-

“.....An alibi is commonly called a defence, but it is to be distinguished from some of the statutory defences, such as the *defence of diminished responsibility* where parliament has specifically provided for a defence and has further indicated that the burden of establishing such defence rests on the Accused. It may be that the true view of an alibi is the same as that of self defence or provocation. It is the answer which the

Accused puts forward and the burden of proof in the sense of establishing the guilt of the Accused rests throughout on the Prosecution. If a man puts forward an answer in the shape of an alibi, or in the shape of self defence, he does not, in law, thereby assume any burden of proving that answer”

That view was followed in the case of **Leornard Aniseth v. R (1963) E.A.L.R. 206 and Sekitoleko v. Uganda (1967) E.A.L.R. 531.**

The Court must therefore consider the reliability of the identification made by the Complainant, and if accepted give reasons for rejecting the alibi evidence adduced on behalf of the defence.

The Complainant in this case admitted that he was an alcoholic. He had been drinking with the Accused on previous occasions and he knew him well. On the material day, there is no evidence except that of Mike Robert Barbe that he was under the influence of liquor. In cross examination, Barbe was asked whether a person who was in pain and with a profusely bleeding injury would ask him for a cigarette as he stated. He replied “*he was drunk*”. In the context of his evidence, the Court cannot consider that reply as a positive observation that the Complainant was drunk as no one else testified to that effect. Hence the testimony of the Complainant that he first saw the Accused looking at him, and then suddenly attacking him, provides overwhelming identification of a person previously well known to him. During the visit of the *locus in quo*, the Court observed a small light fixed on the balcony of the Gopal shop. Although the shop may have been closed at the time of the incident there would have been sufficient light in that area for the Complainant to identify the Accused as his assailant. The evidence of Moller Meme that that light was not switched on the day of the incident has not been corroborated

by anyone of the other witnesses. As the Complainant was sober, or at any rate not under the influence of drinks or drugs to the extent that he would have mistaken the Accused who is a tall dark middle aged man known to him, for a “fair boy” as has been suggested by defence evidence.

Before considering the alibi set up by the defence, one of the guidelines laid down in ***R v. Turnbull (1976) 63. Cr. Appl. R. 132 at 139*** is relevant. In relation to trials before a jury, it was stated that-

“Care should be taken by the Judge when directing the jury about the support of an identification which might be derived from the fact they have rejected an alibi. False alibis might be put forward for many reasons: an Accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the jury is satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward can fabrication provide support for identification evidence. The jury should *be reminded that proving the Accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was*”

Adopting this guideline to the present case, the Accused exercised his right to remain silent but called witnesses to establish an alibi. As I stated, no adverse inference is drawn against him as he has exercised his rights. Hence unlike the situation envisaged in the above guideline, the alibi stands or falls on the merits of evidence of those witnesses, and the consideration of the Court whether the Accused had the time and opportunity to commit the Act. In his respect, ***Phipson on Evidence – Para 382*** states

“The facts that the Accused was in the neighbourhood about the time of the act, or had the opportunity of committing the act, or that Articles belonging to him were found near the spot, is relevant.”

In the present case, even on the evidence for the defence, the Accused was in the neighbourhood, which was walking distance to the spot where the Complainant was attacked. The Court observed during the visit of the locus in quo that all the defence witnesses (except Mike Barbe) were either relatives or friends of the Accused and lived close to each other and along the path allegedly taken by the Accused that evening. That was a convenient opportunity to set up a false alibi.

As regards the aspect of opportunity, the Accused having been in the neighbourhood, time is of the essence. A reliable witness as to time was P.C. Thomas (PW5) who testified that he set out from the Anse Aux Pins Police Station at 8.15 p.m. upon receiving a telephone call. Hence by that time, the Complainant who had been injured, had walked from the Gopal shop to Linda Laporte's shop, which was closeby. At the visit of the locus in quo, it was observed that he could not have taken more than 5 minutes to walk there. The telephone call was made by Wendy Laporte at 8.15 p.m. Hence the Complainant would have been stabbed at around 8.05 p.m., making an allowance for Wendy to come up to the Complainant and making two phone calls.

Moller Meme (DW1) saw the Complainant around 8 p.m. He was a reluctant witness. At first he stated that he did not know anything about the case. Although he subsequently testified, the Court observed from his demeanour that he was not prepared to state the whole truth about the incident. At the locus in quo, it was observed that he lived right in front of the shop and should have seen or heard much more. Hence he was not a credible witness.

Rolly Asba (DW2) saw the Accused before 6 p.m going up Capusin road to his son's house. Dona Jean Baptiste (DW3) who lives on the way to that house was certain that both the Accused and Asba passed his house at 6.30 p.m. when the radio announcements were being made. Again he saw the Accused at 5 minutes past 8 p.m. when he was watching television news. The Accused's son was walking ahead of him. He is the nephew of the former concubine of the Accused, Marie Ange Sinon (DW6). Juan Michel (DW4) who was not a relation, but an acquaintance of the Accused was seated near the entrance to the Capusin road past 8 p.m. when the Accused came looking for his son. He did not know from which direction he came. He stated that it was a 10 minute walk from where he met the Accused to the Gopal shop. There was no reason for the Accused to look for his son at that time as both of them, according to Juan Baptiste, came down together, although the son was walking ahead of him. Apart from that aspect of the matter, Juan Michel's evidence tends to show opportunity for the Accused to have inflicted injuries on the Complainant and either walk or run to the place where he was.

Marie Ange Sinon (Dw6) the former concubine of the Accused was fixing the time she saw the Accused and Rolly Asba walking up at 6.30 p.m. when radio announcements were being made. She did not see either the Accused or his son thereafter. Marcel Fred (DW7) who presently lives with Marie Ange Sinon parked his pick up down the pathway and went home. At the visit of the locus in quo, it was observed that the distance was about a five minute walk. He spent about 5 minutes there and went back to a shop which was about 10-15 minutes walk. When he was returning, he met the Accused and his son going down. Hence on the basis of his evidence, making allowances for approximations, he ought to have seen the Accused and his son going away at around 7.15 p.m. to 7.30 p.m. the latest. There was therefore a difference of at least half an hour for the Accused to commit

the offence and come looking for his son, past 8 p.m as testified by Juan Michel. Dona Jean Baptiste's evidence that he saw the Accused and his son 5 minutes past 8 p.m. contradicts Marcel Fred's evidence, that he saw them, (*on the basis of his movements between 6.30 p.m. and returning home with bottles of cola*) at around 7.30 p.m the latest. Further, if both the father and son came down together, there was no reason for the Accused to look for his son past 8 p.m. In this respect, I prefer to accept the evidence of Don Juan, who is not a relative to the Accused, and as he had been sitting in that place for two hours and did not see the Accused passing that place before. According to him, the son of the Accused passed him earlier and got on to a P.U.C. jeep and went away. Therefore the Accused could not have accompanied him as testified by Dona Jean Baptiste and Marcel Fred. Hence Rolly Asba, Dona Jean Baptiste, Marie Ange Sinon, and Marcel Fred had fabricated evidence to put the Accused at a different place at a different time. In doing so they conveniently fixed the movements of the Accused to the times when radio announcements and TV. News were broadcast, to attach credibility to their evidence. On a consideration of all the evidence in the case, the fabricated evidence lends support to the identification evidence of the Complainant.

The defence also attempted to create a doubt in the mind of the Court by adducing evidence that one of the "*fair skinned boys*" seated on the short wall would have been the Assailant. One of them was Jimmy Sinon. In answer to a question by Counsel for the Accused, the Complainant stated "*Jimmy came to help me, but was not ready to assist him, so, I went in search of help". Mike Barbe (DW5) saw Jimmy Sinon past 8 p.m. wearing a blood stained shirt and wiping his hands. Although the answer given by the Complainant was not clarified at that stage, Mike Barbe's evidence was not inconsistent with the Complainant's assertion that Jimmy came to help him. Inferentially therefore he would then have come in contact with the man who was bleeding profusely and thereby stained his shirt and hands. In*

any event, the Court is satisfied that the Assailant was none other than the Accused, as he alone had a motive to attack the Complainant for divulging to Regis Felix that he was waiting to kill him.

Accordingly, I accept the identification evidence of the Complainant.

Considering the two counts against the Accused, Count 1 is for the offence of attempted murder, and Count 2 is for doing an act intended to cause grievous harm. The penalty for both offences is a possible sentence of life imprisonment. As for the offence of attempted murder, "*attempt*" is defined in Section 377 of the Penal Code as-

"377. When a person, intending to commit an offence, begins to put his intention into execution by means adopted to its fulfillment, *and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence*".

Hence mens rea or intention is required for attempting to commit an offence murder. For a charge under Section 207(a), such intention must be to cause death of another or to kill another. The three elements of the offence of murder are (1) malice aforethought (2) causing the death of another (3) by an unlawful act or omission. Malice aforethought is established by proving that the intention was to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not, and also that the Accused had the knowledge that the Act causing death will probably cause the death of or grievous harm to a person whether such person is actually killed or not although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused. For a charge under Section 219, the Prosecution must prove intent to maim, disfigure or disable a person, or to do some grievous harm. "*Grievous harm*" is defined in Section 5 of the Penal Code as –

“Grievous harm means, any harm which amounts to a maim or *dangerous harm, or seriously or permanently injures health or which extends to permanent disfigurement or to any permanent or serious injury to any external or internal organ, membrane or sense*”.

According to the evidence in the case, the Accused was hiding behind the wall of the Gopal shop and attacked the Complainant with a sharp object. The Complainant stated that he was stabbed five times. P.C. Thomas noticed two cut wounds. However, according to the medical report (P2) there was one penetrating wound of about 10 cm in the left pectoral area. There was active bleeding inside the thorax, and hence a thoracotomy was performed to arrest the bleeding. The medical terms “*pectoral*” and “*thorax*” refer to the chest. There is no positive evidence as to the weapon used to inflict the injury, save for the evidence of W.P.C. Jane Barbe that pieces of broken glass were picked up for analysis, for finger prints. But no finger prints were found. Photographs nos 3, 4, and 5 of exhibit P1 also show scattered pieces of broken bottle. Hence according to the Prosecution, the possible weapon was a broken bottle. In any event the injury was caused by a sharp object. The facts and circumstances of the case disclose that the predominant intention of the Accused would have been to cause grievous harm. An intention to cause grievous harm though a sufficient *mens rea* for murder, is not sufficient on a charge of attempted murder-***Whybrow (1951) 35. Cr. Appeal Rep 141.*** On a charge of attempted murder nothing short of an intention to kill would be sufficient. Hence I convict the Accused under Count 2 for doing an Act intended to cause grievous harm, contrary to Section 219 (a) of the Penal Code as charged, and acquit him on Count 1 for the offence of attempted murder.

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A. R. PERERA
JUDGE

Dated this 18th day of July 2005

