

# **IN THE SUPREME COURT OF SEYCHELLES**

**THE REPUBLIC**

**VERSUS**

ALLAN AH-KONG

**ACCUSED**

Criminal Side No 69 of

2004

Mr. R. Govinden for the Republic

Mr. F. Ally for the Accused

## **JUDGMENT**

**Perera ACJ**

The Accused stands charged on two counts, Count 1 with the offence of robbery with violence, contrary to Section 281 of the Penal Code and Count 2 with the offence of retaining stolen property, contrary to Section 309 of the Penal Code. According to the particulars of the offence charged in Count 1, it is alleged that the Accused, on 22<sup>nd</sup> May 2004 at Point Larue, robbed Philip Gabriel and Therese Gabriel of one bottle of "Cointreau", valued at Rs.350, one bottle of "Old Grog" Alcohol, one "Nokia" Mobile Phone 3410, serial no. 351116 – 20 – 895854-5 valued at Rs.2000 with its charger, a packet of "Malboro" cigarettes containing 200 cigarettes valued at Rs.400, and a machete with a black handle marked "lasher tools", and that at the time of such robbery was armed with a knife and used personal violence on Philip Gabriel. In the particulars of the offence charged in Count 2, it is alleged that the Accused on 26<sup>th</sup> May 2004, at Point Larue was in retention of one "Nokia" Mobile Phone 3410, serial no. 351116 – 20 – 895854 – 5 valued at Rs.2000 with charger, and a machete with a black handle marked "lasher tools" belonging to Philip and Therese Gabriel, whilst knowing or having reason to believe the same to be feloniously stolen, taken or obtained or disposed of.

## The Facts

The residence from which the Accused is alleged to have stolen the goods mentioned in the charges, is owned and occupied by Philip Gabriel and his wife Therese Gabriel and Margret Payet, a sister of Therese Gabriel. Mary Yvonne Gabriel, daughter of Mr. & Mrs Gabriel also resided there. However the latter, was not present at the time the incident took place. According to the evidence of Philip Gabriel, which is corroborated by Therese Gabriel and Margret Payet, all the occupants went to a party around 8.30 p.m. on 22<sup>nd</sup> May 2004. Before leaving they heard their dogs barking, indicating the presence of someone in the garden. They informed the Police, who undertook to patrol the area. After returning from the party around 11.20 p.m, Philip Gabriel was watching TV, while Margret Payet also did the same in her room. Therese however noticed that her wardrobe doors were open and the drawers pulled out. She opened the door of the bedroom of her daughter, when a person jumped on her and started to kick her. All three witnesses stated that there were two persons, who were masked, with only their eyes exposed. They were wearing a long one piece suits and wore gloves. Philip told them "what do you need, do not do this, tell what you need". Neither of them spoke. They continued to kick and assault all three of them. The three witnesses testified that they identified the Accused as one of the assailants by his characteristic demeanour, as all of them were familiar with him, as he had lived with them for about 7 years, more or less as a member of the family. On the issue of identification, Philip Gabriel stated –

*"I recognized him by his kicks, by the way he moved with speed and the way he hit me with the stick and when he threatened me with a knife".*

Therese Gabriel stated –

*"From the way he walked, we suspected the Accused."*

Margret Payet stated –

*"I recognised that it was someone who knew our house, someone who knew us, and from the back, I could recognise that it was someone like him."*

*"When he was walking, the way he walks, and his height and his built. He walks in a hurry, like this (witness demonstrates). Because you can recognise someone who has lived with you".*

***Philipson on Evidence (12<sup>th</sup> Edition) Para 381 under the Sub Heading “Personal Characteristics”***

states thus –

*“Where a party’s identify is in issue, it may be proved or disproved not only by direct testimony, or opinion evidence, but presumptively by similarity or dissimilarity of personal characteristics; eg. age, height, size, hair, complexion, voice, handwriting, manner, dress, distinctive marks, faculties, as well as of residence, occupation, family relationship, education, travel, religion, knowledge of particular people, places, or facts, and other details of personal history”.*

P.C. Roland Adelaide (PW 7) who inspected the scene testified that although the house had been ransacked, no fingerprints could be lifted. This evidence corroborates the evidence of the three occupants that the two persons who stole the goods wore gloves.

***Philipson further states at Para – 400 that –***

*“Incriminating material found in an Accused’s possession may be admissible if it tends to identify him and thus negative mistaken identification by Prosecution witnesses. This Rule applies where identification is in issue although there is no proof that the property or instruments were used in the crime charged, providing there is some feature of the case which makes them relevant to the question of identification”.*

In this respect, the evidence of S.I. Ron Marie (PW2) is pertinent. He executed a search warrant (P6) at the residence of the Accused in his presence on 26<sup>th</sup> May 2004 at 21.00 hours. Among the items found inside a bag which was inside a discarded cooker kept in the basement of his house was a “Nokia” Mobile Phone. The Officers who accompanied him in the search found a machete, in the house. The Accused told him that the bag and the machete were left in his car by a passenger who had hired the vehicle. The Police Officer identified the machete produced as an exhibit in Court as the one that was seized by him. Witnesses Philip and Therese Gabriel also identified it by the colour of the handle and the mark “*lasher tools*” engraved thereon. Philip Gabriel (DW3) testified that that machete was in the house, but was found to be missing after the robbery. As regards the Mobile Phone, Therese Gabriel (DW 4) identified it as the “Nokia” Phone which she used while on a trip to Mauritius and stated that she had written the phone number at the back of the phone on a masking tape as she sometimes forget her own number. She also gave the serial number of the phone from the box that had been left behind by the

thieves. The numbers tallied with the number given in Counts 1 and 2 of the charge. Hence the Accused was found in possession of at least two items which the Prosecution alleges in the charge as being the goods stolen by him.

As regards identification, the three witnesses Mr. & Mrs. Gabriel and Margret Payet observed the height, mannerisms and demeanour of the assailant as being the same as that of Allain Ah-Kong who had lived with them for sometime. Being so familiar with him, they had no doubt that it was Allain Ah-Kon, but they did not implicate him, as he was masked and had camouflaged himself. However, one of the guidelines in the case of ***R v. Turnbull (1976) 63 Cr. Appl. R. 132***, was that –

*“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made”.*

I warn myself of this possibility, and proceed to consider other evidence which the Prosecution adduced to establish the identity of the Accused. S.I. Rony Julienne (PW1) upon receiving information that one Mr.Chetty a shopkeeper had purchased some stolen goods, went to the shop at Au Cap on 28<sup>th</sup> May 2004 around 19.05 hours, with three other Officers. Mr Chetty handed over one packet of “Malboro” cigarettes, one bottle of “Cointreau” and one bottle of “Old Grog rum” and 200 euros. He told him that he had purchased, them from one Ah-Kon. Bala Subramanan Chetty (DW6) the shopkeeper, in his evidence identified the Accused in the dock as the person who gave him these items about a week before 29<sup>th</sup> May 2004. He stated that the Accused came to the shop and bought a Cable and Wireless pre-paid card and some bottles of beer and offered him 200 euros. He declined at first, but he bought the euros for Rs.1700. He bought some other goods and paid him Rs.500. Chetty asked for his telephone number in case he fell into trouble, and he gave it, but he has now mislaid it. The items he bought from the Accused were, a bottle of red label whisky, a bottle of rum, a square shaped bottle of gin starting with the letter “C” and a carton of Malboro cigarettes. When the Police came, he had already sold the red label whisky bottle, so he gave them the two bottles of “Cointreau” and “Old Grog”, the carton of cigarettes and 200 euros which were in his possession. He identified the exhibits produced in the case as exhibits P1, the bottle of “Cointreau”, the bottle of “Old Grog” rum (P2) and the carton of Malboro cigarettes (P3). The euros were not produced.

In the case of ***Thompson v. R. (1918) 13 Cr. App. Rep. 61*** it was held that –

*“Where the question of possession is in issue, it is a question of fact for the jury, and once the jury is satisfied that a defendant was in sole or joint possession of the relevant Articles, they became admissible in evidence against him as tending to negative alleged mistakes in the identification of him by crown witnesses”.*

In the present case, the "Nokia" Mobile Phone and the machete were found in the possession of the Accused. The Accused in his statement from the dock stated that the Mobile Phone was given to him by one Brian Alcindor who was a passenger in his car, when he told him that his phone was defective. So he did not charge him the fare for the trip. As regards the machete, he stated that when he was cleaning the car he saw it on back seat, and hence he kept it in his house. However it was the evidence of the S.I. Ron Marie (PW2) that during the search at the premises of the Accused, the Accused stated that the "Nokia" Phone and the machete had been left in his car by a passenger. Further in his statement from the dock, he stated that Brian Alcindor told him that he had four bottles of alcohol and one carton of cigarettes for sale. He took him to an Indian Merchant in his car. In the presence of Alcindor he sold the items and received Rs.650, which he gave Alcindor. The Accused also stated that subsequently upon a person telling him that he had transported a "bandit", he telephoned and told Lieutenant Colonel Robert Ernesta under whom he had worked in the Army, that he had important information to give him. He was at a meeting at that time but undertook to call him back. However the Accused was arrested before that. In this respect, Lieutenant Colonel Ernesta (DW1) testified that the Accused indeed telephoned him and told him that he was going to seek Special Police Service and that the information that he would give would lead to the arrest of that person. On being cross examined he stated that the Accused spoke to him after being arrested. He also stated that the Accused told him about the circumstances of his arrest, and that he had made friends with one Alcindor, who had given him things which he had kept at his residence. Later he interviewed him at the Police Headquarters, as he knew that as an army Officer he would confide in him. However questioned by Court, and also by Counsel for the Accused who questioned him from matters arising therefrom, Lieut. Colonel Ernesta stated that when the Accused spoke to him for the first time he had not been arrested. He also stated that he was present when the search warrant was being executed to search the premises of the Accused. S.I. Ron Marie however did not testify about his presence nor was he questioned about it. Although the evidence of Lieut. Colonel Ernesta's evidence is partly contradictory, what emerges is that the Accused was trying to implicate a person called Brian Alcindor with the Commission of the offence, and thereby exculpate himself. The Court is not satisfied with the evidence of Lieutenant Colonel Ernesta, as it is unreliable.,

On the basis of the evidence of Mr. & Mrs. Gabriel and Margret Payet as to the identity of the Accused as the person involved in the robbery with violence; the discovery of goods identified by them as the stolen goods found in the possession of the Accused lends support to such identification. Hence the quality of identification being reliable, the Court is satisfied beyond a reasonable doubt that the Accused was one of the persons who committed the offence at the premises of Mr. & Mrs. Gabriel.

The identity being established, it remains to consider whether the Prosecution has proved the elements of the two offences beyond a reasonable doubt. In respect of Count 1, Section 281 of the Penal Code is as follows-

*“281, Any person who commits the felony of robbery is liable to imprisonment for eighteen years.*

*If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company with one or more other person or persons, or if, at or immediately after the time of the robbery, he wounds, beats strikes or uses any other personal violence to any person, he is liable to imprisonment for life”.*

To constitute “robbery” there must be proved theft, preceded, accompanied or followed by the use of threats of use of actual violence to any person or property for the purpose of obtaining or retaining the thing stolen or to prevent or overcome resistance to its being stolen or retained. In the present case, goods had already been stolen by unlawfully entering the premises in the absence of the occupants, and a vicious attack visited on them to prevent or overcome any resistance to those stolen goods being retained. Although the occupants did not see the Accused in possession of the stolen goods at any time, they were able to determine what they were and to inform the Police. Of these items, the “Nokia” Phone and the machete were found in the premises of the Accused. Further from the stock of liquor stolen, at least there is evidence that the Accused sold a bottle of “Cointreau” and a bottle of “Old Grog” gin and a carton of Malboro cigarettes to a shopkeeper. These items were positively identified by Mr. & Mrs. Gabriel and Margret Payet. On the basis of the evidence, the Court is satisfied beyond a reasonable doubt that the Accused had the necessary mens rea to steal, and thereby had the intention to permanently deprive the owners of the property they stole, and that he dishonestly appropriated the stolen goods. Further in the course of the robbery, he beat the three occupants causing injuries. According to the medical report (P9) in respect of Philip Gabriel, who was 75 years of age at that time, the injuries were –

1. *Localised trauma on the right forehead.*

*Trauma of the nose.*

*Abrasions and bruises on the right side of the nose.*

The medical report (P10) in respect of Therese Gabriel, who was 70 years old at that time, the injuries were-

1. *Trauma on the nose and right angle of the mandible .*

*Trauma on the right hypochondriac on the palm and upper sternum.*

*Bruises on the nose.*

The medical report (P11) in respect of Margret Payet who was 60 years old at that time, the injuries were –

1. *Trauma on the face, back chest and right thigh.*

*Tenderness on the right upper thigh.*

Dr. Sumir Ahmed (DW8) testified that these injuries were consistent with an assault. On the basis of this evidence the Court is satisfied that those injuries were caused by the Accused when he beat and attacked the occupants with a stick, and kicked them together with an unknown person on the night of the robbery. Hence the aggravation being established beyond a reasonable doubt, the charge of robbery with violence is complete, and therefore I find the Accused guilty on Count 1, and accordingly convict him.

As regards Count 2, the essential ingredients of a charge under Section 309 of the Penal Code are that (1) the Accused received or *retained* the property in question (2) that property was stolen and (3) that at the time he received it or *retained* it, the Accused knew or had reason believe it was stolen. In the present case, the "Nokia" Phone and the machete were stolen by the Accused himself and were retained by him until the Police found them. The "Nokia" Phone was hidden inside a discarded cooker which was in the basement of the house. Therefore the guilty knowledge is established. The machete was in the kitchen. He did not claim that it belonged to him. Therefore he had the intention to retain it. As stated before, he gave contradictory explanations for his possession. Section 309 is different from Section 310. The essence of Section 309 is that the Prosecution must prove that the property was stolen and that the Accused knew or reason to believe that to be the case. However, under Section 310, the Prosecution must adduce evidence to show that there was a reasonable suspicion that the property was stolen or unlawfully obtained. A person is found guilty of the offence under Section 310 only if he fails to give satisfactory explanation to his possession of the property.

Count 2 under which the present Avccused is charged is based on Section 309. Hence the Prosecution has established beyond reasonable doubt that the "Nokia" Phone and the machete had been stolen from Margret Payet and Philip Gabriel respectively, and that the Accused knowing them to be stolen had hidden the Nokia Phone and retained the machete in his house. Hence the charge of retaining stolen property under Count 2 having being established beyond a reasonable doubt, I find the Accused guilty under that Court and accordingly convict him.

The Accused is therefore convicted for the offences of robbery with violence, and retention of stolen property as charged in counts 1 and 2.

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A. R. PERERA

**ACTING CHIEF JUSTICE**

Dated this 29<sup>th</sup> day of August 2005