IN THE SUPREME COURT OF SEYCHELLES

THE REPUBLIC

V/S

1. **MR CLIFF EMMANUEL**

MR RICHARD FREMINOT

Criminal side No. 85 of 2003

……

JUDGMENT

Gaswaga, J

Mr Cliff Emmanuel (A1) and Mr Richard Freminot (A2) have been jointly charged with two counts; (1) Manslaughter contrary to Section 192 read together with Section 23 of the penal code CAP 158 and, count (2) Robbery contrary to Section 281 and punishable under the provisions of section 281 read with section 23 of the penal code CAP 158. The particulars allege that Cliff Emmanuel, Richard Freminot and Patrick Lime who earlier on pleaded guilty to the offence of manslaughter and was accordingly convicted and sentenced, on the 19th day of August 2003 at Point Larue, Mahe committed the offence of manslaughter of Norah Antat and thereafter at the same place all the three

accused persons robbed Fanchette Antat of her property to wit several pieces of jewellery consisting of gold earrings with precious stones, gold rings, gold bracelets, gold necklaces, silver necklaces and a flat computer screen all worth the approximate amount of Seychelles Rupees one hundred thousand (Rs100,000). Save for Patrick Lime, the other two accused persons A1 and A2 pleaded not guilty to both offences whereupon the prosecution had to call witnesses to execute the burden placed on its shoulders to prove the case beyond reasonable doubt.

I find it imperative to briefly narrate the facts of this case, which culminated with the arrest, and subsequent arraignment of the accused persons herein. On the morning of the 19th of August 2003 Fanchette Antat PW 6 and daughter to the deceased, as usual left her house in proper order for work at the Ministry of Tourism. When she returned home in the afternoon at 02.00 pm she together with her driver David Richard PW 8 and, Mr Hans Marguerite PW 4 who was doing some construction work on the house discovered the deceased Norah Antat lying on the floor of the living room. Both of her hands were tied at the back. The legs too were tied together while her upper part of the body was covered with a plastic tablecloth. Her mouth had been gagged with pieces of cloth. She was motionless and later on at 04.45 pm DR Murahidhar Vuppunuthula PW 11 of Victoria Hospital certified her dead. See (Medical certificate P4.)

On 21 August 2003 Dr Maria Zlatkovich PW 13,a Pathologist at the same Hospital examined Norah Antat's body and found the following external injuries; cyanosis (congestion of the blood) of the face and hands caused by obstruction of the nose and mouth. She concluded in her report P4 that the cause of death was asphyxia (a lack of

oxygen) resulting from suffocation due to blockage of the nose and the mouth. That these mechanical causes obstructed the upper air ways and she further suggested that obstruction could be done with different objects like a pillow and, once deprived of air, depending on the violence, it could take a person two to three minutes to die.
Fanchette Antat PW6 testified in court that she left home at 07.30 am on that day after having breakfast with the deceased. She then telephoned her mother a number of times from 10.00 am till 02.00 pm when she decided to check on her but there was no response. Molly Antat PW 9 started calling her mother on the house telephone at 09.00 am with no answer. Upon arrival Fanchette Antat looked through the window and noticed that all the rooms and wardrobes of her house had been ransacked. All the items listed in count two of the charge sheet and belonging to her were missing.

Assistant Superintendent of Police (ASP) Reginald Elizabeth (PW2) attached to Scientific Support and Crime Record Bureau attended the scene and took the photographs exhibited as P1 and P2 and, developed and printed by Mr Henry Jean-Louis (PW1).

Perhaps at this point I should first deal with the motion raised by Mr Elizabeth to have the case dismissed on technicality that the charge and indictment as drafted by prosecution is bad for duplicity. His quarrel was in respect of count two most especially the phrase containing the last ten words added during the recent amendment. Count two reads as follows;

Statement of offence

Robbery with violence contrary to section 281,read with section 23 of the penal code and punishable under the proviso to section 281 of the penal code.

Particulars of offence

Cliff Emmanuel also known as "Katilo", Richard Freminot and Patrick Lime on the 19th of August 2003, in the district of Pointe Larue unlawfully robbed one Fanchette Antat of Pointe Larue of several jewelleries consisting of gold earrings with previous stones, gold rings, gold bracelets, gold necklaces, silver necklaces and a flat computer screen all worth the approximate amount of Seychelles rupees one hundred thousand (Rs.100, 000) and during the said Robbery unlawfully killed Norah Antat.

Mr Elizabeth contended that count one alleged that Cliff Emanuel had committed manslaughter and that the same allegation against the same victim, Norah Antat was repeated in count two in addition to the particulars of the offence of robbery with violence which mistake or act of bad drafting calls for the court to quash the indictment and inevitably order an acquittal. He relied on numerous authorities including **DPP V/s Marymend, 1973 AC at 584 and Regina V/s Mansfield (1977)1 W.L.R at 1102.** the golden rule was stated that "an indictment may contain several counts but each count must allege only one offence**."** Govinden protested against the manner in which the motion was brought especially that it was being presented at a very late hour of the proceedings to catch the prosecution off guard and deny them a chance to cure the defect if there was need. The prosecution also submitted that the statement of offence clearly defined the different offences in that charge to the accused who even took his plea without any complaint. But a plain reading of the indictment in question, in my view and as rightly pointed out by Mr Elizabeth, could easily cause confusion to an accused as the

particulars in count two tend to send a message of two distinct offences to wit; 'robbery' and 'unlawful killing', which makes it bad in law for duplicity.

The court then asked Mr Elizabeth the following questions, which have been extracted from the record:

***Q**. Why did you not raise this issue as a preliminary point of law?*

***A**. The reason was that we did not want to give the prosecution the opportunity to amend the charge and then to proceed. It was an approach which we have taken now, the timing is now because basically …….. they have now closed their case My Lord.*

***Q**. As an Officer of this court you are supposed to assist the court in the interest of justice ……. ?*

***A.** Certainly My Lord. I am here not to assist the prosecution but to defend my client ……. and if there is a loop hole in the law, there is something which the prosecution should have done but they have not done I would use it to my client's advantage to get an acquittal My Lord.*

***Q**. So it is bad for duplicity …… Is it curable?*

***A**. It would have been curable if the prosecution had not closed their case …. they do not have the power to amend the charge. That is why the motion was not made at the outset*

My Lord.

***Q**. …… the charge is bad for duplicity, has it in any way affected the accused? If at all it has in what way? ……*

***A.** My Lord it has not affected the accused in any way because the accused is charged with an offence of robbery and the prosecution brings evidence that the accused committed robbery. So the accused comes prepared to defend himself against a charge which is levelled against him which is robbery. <u>The defective charge is only a technicality.</u> It is something which the prosecution did not foresee or mistook on behalf of the prosecution which the defence then takes advantage of.*

***Q**. At what point in time did you note that?*

***A**. My Lord I noticed that from the outset of the proceedings but as I submitted to the court the reason why the motion was not made from the outset was if it had been made from the out set the prosecution could have amended the charge and say okay we agree that the charge is bad for duplicity and we will amend. When the prosecution closes its case and the motion is then made where a count is bad for duplicity then the prosecution does not have the opportunity.*

***Q.** But if they accepted……section 187 of CPC does not allow anything like amendment?*

A. *No it does not. So the court would have only one option to quash the indictment on that basis.*

Q*. How would that prejudice your client?*

A. *It does not prejudice my client …..…*

Section 187 (2) (a) of the Criminal Procedure Code Cap 54 is relevant and reads:-

(2) An amendment may be made-

(a) before trial or at any stage of a trial, except that in a trial held by a Magistrates court no amendment may be made after the close of the case for the prosecution;

It should be stressed that not every defect and irregularity in a charge makes a charge bad in law to the extent of rendering the ensuing proceedings a nullity. Duplicity *per se*may, but not necessarily, lead to a charge or conviction being quashed .A wealth of authorities have unanimously suggested that the test should be whether the defect has occasioned a "miscarriage of justice" See **Uganda V/s Dickens Elatu Crim Rev No 71 of 1972**. **Archibold, 38th Edition, para. 925** the meaning of that expression

"A miscarriage of justice within the meaning of the proviso has occurred where by reason of a mistake, omission or irregularity in the trial the appellant has lost a chance

of acquittal which was fairly open to him." Clearly, a charge should not be quashed upon a mere technicality that has caused no embarrassment or prejudice to the accused. From the answers provided by Mr Elizabeth it cannot be said that his client suffered any embarrassment or prejudice nor can it be said that the defects complained of occasioned him any miscarriage of justice during the trial. Had that been the case the motion would have been raised well in time to stop the injustice from continuing as the accused and his counsel watched. The defence chose to sit on their rights. Moreover, equity helps the vigilant.

According to **Blackstone's CriminalPractice,1992 page** ,where a count is bad on its face for duplicity, the defendant should move to quash it before the accused is arraigned. Although the objection can be taken at a later stage, as was the position in the case of **Johnson (1945) K.B 419**, the court of appeal has disapproved of the defence postponing the application to quash for purely tacticalreasons. **See Asif (1982**) **Cr.App.R 123**. It is also open to the prosecution to defeat a motion to quash by asking the judge to allow a suitable amendment of the indictment. This the prosecution did not do and the defence, as indicated above, intended and was all out to trap them. A court administering substantive justice however should never allow a party to thrive on technicalities.

Mr Elizabeth has pointed out what he called another defect in count two that the property robbed belonged to Fanchette Antat but the violence was allegedly visited on a different separate and independent person, Norah Antat, at a different time and that as such the offence should have been one of theft and not robbery. He also invited me to dismiss the charges arguing that the words "any person" in section 280 of the penal code cap 158 meant and could only refer to 'the person on whom the act of robbery is being caused'. Regarding this submission as frivolous Mr Govinden averred that sections 280 and 181 of the penal code required the prosecution to prove that violence was meted out on "any

person", whether that person is the owner of the property stolen or not, before, during, and or after the act of stealing if the robbery charge was to stand. I do not think the words "any person" lend themselves to such restrictive interpretation as Mr Elizabeth had sought to place on them. The intendment of the penal code and therefore the legislature, apparently, is to give a wide meaning to the words "any person" so as to include such cases, which the legislature must have envisaged, where goods are or property is stolen from custodians or from the hands of third parties, as is always the case. The present case is no exception. By adding the element of violence the framers of the code must have intended to lay a clear distinction between the ordinary offence of 'stealing' and that of 'robbery'. Where the provisions of a statute are capable of a wider and narrow meaning, a liberal interpretation, which does not deprive a citizen of justice, is to be preferred. Further, where also, a narrow meaning will lead to absurdity and callousness whereas the word used is capable of a wider meaning, the wider meaning is to be preferred. A construction, which will deprive a citizen of a right e.g. the right to own and enjoy property exclusively and to protection of same by the state, the right to redress for injustices occasioned by others etc regardless of the illegality, cannot be correct construction. Mr Elizabeth's construction of these words falls in this category. It cannot be said for example that **A**who robs a bank and uses personal violence on **B**the security guard should be indicted for stealing and not robbing money belonging to the bank because (i) the money does not belong to **B**and, (ii) the bank as an institution (legal entity) cannot suffer violence. In conclusion therefore, with the greatest respect to the learned counsel, and I hope I will be acquitted of discourtesy, I decline the invitation to

dismiss the charge and or acquit the accused on the grounds indicated above.

The courts have settled the law on involuntary or unlawful act of manslaughter through the famous cases of **DPP v/s New berry and DPP v/s Jones reported in 1977 AC page 50.**The court of appeal stated inters alia before dismissing these appeals.

(a) An accused was guilty of manslaughter if it was proved that he intentionally did an act which was unlawful and dangerous and that act inadvertently caused death, and

(b) that it was unnecessary to prove that the accused knew that the act was unlawful or dangerous; that the test was the objective test namely whether all sober and reasonable people would recognise that the act was dangerous and not whether the accused recognised its danger.

For the prosecution to succeed on a charge of manslaughter the following ingredients must be proved (a) that act of the accused was intentional; (b) that act was unlawful and dangerous and (c) that act of the accused inadvertently caused death.

Therefore in manslaughter the guilt of an accused is associated with his culpability in

committing an unlawful act, which is unconnected with his intention or foresight to the causing of death. The mens rea should be appropriate to the unlawful act **see.R v/s Lamb (1967) 51 Cr. App. R417.** , *"an unlawful act causing death of another could not simply because it was an unlawful act render a verdict of manslaughter inevitable, for such a verdict inexorably to follow the unlawful act must be such that all sober and reasonable people would inevitably recognise it as an act which must subject the other person to at least the risk of some harm resulting there from, albeit not serious harm".* **See Regina v/s Church (1966) 1QB 59.**

As already narrated herein above there is no doubt that there was a killing in this case which was the result of an unlawful act as confirmed by Dr Murahidhar Vappunuthula PW 11 and the government Pathologist Dr. Maria Zladkotvich PW 13 who testified that Norah Antat died as a result of suffocation caused by a mechanical obstruction of the upper air ways. The legs and hands were tied while the nose and mouth were gagged with a plastic tablecloth, which also covered most of the upper part of her body as she lay down in the sitting room. There is no doubt again that whoever tied her and also gagged her was carrying out an unlawful act, which all sober and reasonable persons will realise must have subjected the victim to some harm (physical harm as described in the case of **Rep. V/s Ernesta 1985 SLR**) which ought not to be serious harm. It is immaterial whether it was known to whoever did it that the act was unlawful. The prosecution led evidence establishing the circumstances under which Norah Antat died. That on the morning of 19thAugust 2003, the deceased who was apparently in good health and proper

shape had breakfast with her daughter Fanchette Antat before the latter left for work at 7.30 a.m. At 9.00 a.m. Molly Antat telephoned her mother on the house line, as did Fanchette Antat at 10.00 a.m. but both received no response.and at 2.00 p.m. the body of Norah Antat was discovered in the house.

Any sober person aught to have known that the assault or treatment of such an elderly lady by way of tying her legs and her hands as well as gagging her mouth and nose should have occasioned her some risk of harm. She was confined, could not walk nor use her hands to free herself or scream for help. Eventually she could not breath as she lacked supply of oxygen, all these intentional, unlawful and dangerous acts by her assailants resulted into her death. The persons who allegedly committed the crime paid no regard to what would be the outcome of their acts thus that they would lead to suffocation (a physical harm) although objectively a reasonable person would have at least seen that this would have led to certain harm on the person of the victim.

I find the prosecution to have proved all the elements to manslaughter but what remains to be answered is whether it is the accused herein that committed the crimes alleged.

Section 23 of our penal code has been added on to both counts to have the accused charged jointly. It provides: -

> "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with

> one another, and in the prosecution of that 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."

This section 23 in itself does not create an offence but provides for the establishment of common intention and lays down a principle of joint criminal liability, which therefore is only a rule of evidence. The book "**Law of Crimes**" (23rd Edition) by **Ratanlal and Dhirajlal**offers a commentary on Section 34 of the Penal Code of India (common intention) and states thus –

> "This section is framed to meet a case in which it may be difficult to distinguish between the Acts of individual members of a party or to prove exactly what part was taken by each of them. The reason why all of them are deemed guilty in such cases is that the presence of accomplice gives encouragement, support and protection to the person actually committing the act"

Further**, Ratanlal and Dhirajlal "on Law of Crimes" (supra) states at page 89**

"It is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case. The inference could be gathered by the manner in which the accused arrived on the scene and mounted the attack, the determination and concert with which the beating was given or the injuries were caused by one or some of them, the acts done by others to assist those causing the injuries, the concerted conduct subsequent to the commission of the offence, for instance, that all of them had left the scene of incident together and other acts which all or some might have done as would help in determining the common intention to all. In other words; the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted.The actual assault and involvement therein would undoubtedly be of central importance. But

> culpable liability might arise and be indicated with certain assurance because of preceding; intervening as well as succeeding conduct of the person accused of an offence and claimed to be involved therein. Section 34 (our Section 23) has enacted a Rule of co-extensive culpability when offence is committed with common intention by more than one accused. Such co-extensive culpability would be indicated by reason of actual participation, some overt act, active presence, pre-plan, and preparation, and eventual participation therein as well as immediate conduct after the commission of the offence It would be immaterial by whose hand the eventual blow was dealt……. ."

The evidence of the prosecution witnesses clearly shows that before the 19th August 2003 there was a preparatory meeting at Mr Freminot's House on the 18th August where a plan was hatched to go and rob the house in question. Rene Port Louis had two weeks earlier informed Freminot that there was a safe with money in that house and that an old Italian man lived there but a week later, according to Mr Freminot's statement, and after further observation and surveillance Port Louis confirmed that an old lady who is fond of planting flowers at the house every morning stays at the premises alone after

8.00a.m. It should be noted that in his further testimony, which was given on oath, Port Louis informed the court that at one point in time before the incident he was employed to do some odd jobs in the same home by Mrs Fanchette Antat. He was familiar with the premises. Hubert Bristol, a friend of Freminot deposed that on the 18th August 2003 at around 7.00pm to 7.30p.m. he met Freminot at the Point Larue road which goes up to Nageon Estate. Freminot asked him to lend him a film but Hubert Bristol told him that he had none. Between 8.30p.m. and 9.00p.m. Hubert Bristol, while returning to his girlfriend's flat which is located about 25 meters away from that of Mr Freminot, decided to call on Mr Freminot who was at that moment together with his relatives sitting under the veranda and eating away from a plate. Patrick Lime, one of the accused persons was also present and seated on a gunny bag that had been placed in a corner of the same veranda. That at about 9.30p.m. or 10.00p.m. Freminot borrowed and talked on Hubert Bristol's mobile telephone and in his presence and hearing said "Tilo tomorrow at 7.00" and that again after 15 seconds he asked the recipient of the call to come up. This reference to "Tilo" in the context of later participation was undoubtedly Cliff Emmanuel also known as "Katilo" as indicated in the charge sheet. Indeed shortly there after "Katilo" or Cliff Emmanuel joined the group at the veranda but Hubert Bristol left for his home 15 minutes later where he alleged he arrived at a time between 10.30p.m. and 11.00p.m. Save for Cliff Emmanuel the other two; Freminot and Patrick Lime were well known to Hubert Bristol. That evening Hubert Bristol was interacting with Cliff Emmanuel for the first time although he had seen him before. Rene Port Louis too had interacted with Richard Freminot before but not with

Cliff Emmanuel whose face he said was familiar.

As for Mr Andrew Sophola he testified that on the night of the 18th August 2003 he went to the house of Mr Richard Freminot and among the people present were Mr Richard Freminot, Patrick Lime and Cliff Emmanuel "Katilo". That Richard Freminot informed them that they were going to break into a high-class house at Anse Francois, Point Larue, to get money and gold but warned that an old lady lives there and that it was difficult to break in because the burglar bars were inside. Then Cliff Emmanuel "Katilo" said that *" fodre nou al laba"*(we have to go there) referring to the house. That this discussion between Richard Freminot, Cliff Emmanuel "Katilo", Patrick Lime and Andrew Sophola went on as they were eating food. They all agreed to go there in the early hours of the next morning i.e of 19th August 2003 and hide in the nearby bushes until 8.00a.m. when the other lady staying with the old woman leaves the house to go to work.

When cross-examined Andrew Sophola admitted that he had earlier on been arrested by the police as a suspect in this case and told not to mention about the arrest before the court. He claimed to have attended the meeting at Mr Freminot's place on the night of the 18th August 2003 for 2 to 3 hours i.e. from 5.00p.m. to 8.00p.m. before departing for his home and that Mr Hubert Bristol was among the people he left there. In further cross-examination by Mr Frank Ally, Mr Andrew Sophola, contrary to what was stated

by Mr Hubert Bristol and in Mr Freminot's statement said that Cliff Emmanuel "Katilo" was at Freminot's house from 5.00p.m. to 8.00p.m while Hubert Bristol arrived later on at 6.00p.m and found all the others there. He also stated that during his stay there he did not see Richard Freminot borrow or talk on a mobile phone. Of all the prosecution witnesses Mr Andrew Sophola was severely attacked and lambasted by both defence counsel and his testimony left wanting. A proper evaluation of the evidence by Mr Andrew Sophola reveals some material contradictions in most of his testimony as pointed out herein above which makes it difficult and unsafe for the court to believe him and therefore rely on the said testimony. Accordingly this court rejects Mr Sophola's evidence.

Mr Patrick Barra pw 14 deposed that he was a dog handler with the Dog Unit of the police force for five years. That in the afternoon of the 19thday (and not 18thday of august as he corrected himself during cross examination and re-examination) of august 2003 he was ordered by his superior SP Mousbe to proceed to Port Larue at the locus of crime thus the house which he identified in photographs number 37 and 38.He took along with him a German Shepherd Police dog called "Lady". Corroborating ASP Reginald,Lance Corporal Maxime Payet and Molly Antat he stated that police officers were at the scene of crime, which had been cordoned off. In further corroboration of ASP Reginald's testimony he said that no body had touched anything at the scene before he took the dog to sniff and track the path taken by the intruder. He jumped over a wall and then saw a path that went down and which he later discovered was leading to

a river. At this point he noticed that some grasses had been crashed and there were footprints which the dog sniffed and started the tracking. It led him down that narrow path across the river where people wash from for about thirty minutes to a veranda of a flat in Nageon estate, which he later came to learn that it housed Mr Freminot and his family. Mr Barra had never been there before nor did he know that Mr Freminot and Miss Rose whom he pointed out in court lived in that flat. He then telephoned the police officers he had left at the scene of crime to join him and they indeed came and assisted him to conduct a search at the said premises where upon Mr Freminot was arrested. Mr Barra corroborated ASP Reginald and, Lance Corporal Maxime Payet's testimonies when he said that these two were among the officers that responded to his telephone call and assisted in the search, which yielded nothing incriminating.

Mr Barra also informed the court that this dog was used to him and he personally trained it for four years which training started when the dog was six months old. He related that if he set this dog to pick a scent he could tell, by observing his actions, whether or not he is doing it the right way. That if he does not get a scent he will not go further but just move around and, that if he follows a particular direction Mr Barra would be able to know that he is following the scent picked at that point as instructed. While at Cap Ternay with the advisor who came from overseas to teach him how to train dogs, Mr Barra trained the dog among other things how to save a drowning person and how to locate a person who has escaped and gone into hiding in the bush or building. That dog had on many occasions successfully tracked down people and recovered stolen items. In further cross examination Mr Barra said the dog was also trained to detect drugs and sniff scents and track people who steal things at the beach and from houses. That according to the training he received from his overseas advisor and given his own experience with that dog, after nine hours the dog could still track the scent of a person when it smells his sweat from the path he followed, footmarks, shoes or clothes that person was wearing.

Although Mr Barra could not answer some of the questions put to him complaining that he did the tracking a long time ago while still in the police force and had therefore

forgotten some minor details, he did emphasize however during cross examination that "*I still remember what happened on that day.I can take you to that place where I was and I can show you the path I had taken."* court is convinced that this dog's "propensities and skills" and "breeding and training" made it able to track the path and location of a human being by his particular scent. That person had been to the house in question on the 19th of august 2003 and through the path tracked ended up in Mr Freminot's flat. I am also satisfied that the handler Mr Barra is sufficiently knowledgeable and well experienced in regard to the characteristics of this dog which he personally trained as intimated. Further the court is alive to the need of acting on track dog evidence with caution. **See. Article by G.McCormack "The Admissibility of Tracker Dog Evidence" and, Dulip V/s R (1990) MR 149.**

Jimmy Andre Antoine PW 5 of Point Laure, Camp Pegeon testified that he is a friend of Richard Freminot whom he has known for along time. That on the morning of 19th august 2003 at about 9.00am or 9.30 am, while he was going to play football he met Richard Freminot who was at the time emerging from the narrow footpath that leads to the river and beyond to Anse Francois they walked up together until the point when Freminot branched off into another path that goes to his home while Jimmy Andre continued to the playing field. Later, he stated, Mr Freminot joined them to play football.It was the evidence of Mr Hans Marguerite PW 4 that when he arrived at the house between 11.30 am and 12.00 pm to continue with his construction work he knocked on the door several times and called out "Manman, Manman, Manman", as

usual to ask for a cold glass of water and his lunch but there was no answer. That since the door of the store where his tools were kept was open he thought the deceased had gone to town and he commenced his work. However he noted that the house phone kept ringing all the time.

Lance Corporal (LC) Maxime Payet PW 15 was one of the first officers to come to the scene of crime and was involved almost at each and every stage of the case since he was assisting the chief enquiring officer Sub-Inspector (SI) Sonny Leggaie who is reported to have left for Australia in July 2005 and not returning to Seychelles. That Constable Davis Simeon currently living in England with no hope to return also assisted in the investigations. There were police officers attached to the fingerprint section, the criminal investigations department (CID), ADAMS section, and one constable Barra was one of the two officers from the dog unit. These were immediately dispatched in different directions each with a dog. It was LC Payet's evidence that after SI Leggaie had received a telephone call he ordered them to proceed to Nageon Estate where they found Mr Barra with his dog at Mr Freminot's house. Mr Freminot and Miss Rose together with her children were also present. While at the CID Mr Freminot

was brought from the cells on the 24thof august 2003 to record a statement from him under the supervision of LC Payet, Constable Davis Simeon and SI Leggaie who first explained to him his constitutional rights. This statement was retracted. When cross examined LC Payet stated that while writing the statement Mr Freminot's lawyer, Miss Karen Domingue was allowed to confer with him and when she left Mr Freminot said

he had been advised not to answer any more questions nor sign the statement and requested to be taken back to the cell.

After conducting a *voire dire*and establishing the voluntariness of the statement under caution, the same was admitted in evidence as P7 (Reasons for so doing are outlined in my ruling of 28/03/2006) and I find it imperative to reproduce part of it;

> " ……. I do not recall the date when Rene Port Louis approach me at Tower Point Larue Nageon Estate and told me that there is an old Italian man who is living in a house at Anse Francois close to where Perley lives and overthere, there is a safe and a lot of money. Rene told me that we would continue to do an observation to see how many people there. Two weeks later Rene Port Louis gave me the details and during that time Barry Panagari was there …… The plan to go and burgle the house was not done because I decided not to do it. Then Rene told that in the house its only
>
> an old lady who lives there. 1 week before the 18th *August 2003 around 1600 hours, I met Cliff Emmanuel also known as "Katilo" at the upper part of Point Larue opposite Azemia's house called "Kan Pizon". At that time Rene Port Louis was sitting by the road side ……. he gave all the details of the house of the foreigner to "Katilo" ……. "Katilo" told him to go back and check the house again …… Rene told "Katilo that after 08.00 hours*
>
> *there is only an old lady left at the house alone …… On 18th August 2003*

around 1700 hours Hubert Bristol who is one of my friend came to my house with his mobile which he uses at work and I telephoned Barone around 1900 hours on the number 581126 …..… Barone told me that "Katilo" was with him right now and they he would pass the phone to "Katilo". I spoke to "Katilo" for about 1 minute and told him to come to my house the next day …..… 19th August 2003. "Katilo" said he was coming this evening …..… Patrick Lime was there, Hubert ate he stayed here until when "Katilo" came ….. about 20 minutes later …..… Before 2000 hours Hubert ….. went to his house, behind there were "Katilo" Patrick Lime and myself. "Katilo" said to Patrick Lime and I let's go and buy bread, that means lets go and steal ……. The next day 19th August 2003 around 0700 hours ….. "Katilo" came and call me …..… said it is time to go and get bread that means to steal. …..… I wore a white sleeveless shirt and greenish jeans and sleepers. We went towards the river ….. 15 minutes later Patrick Lime came he had brought 7lb hammer which had a long handle, as Rene Port Louis said there was a safe in the house. …..… we took some small foot path which separate Anse Francois and Pointe Larue and we were about 30 to 35 meters from the old lady's house at Anse Francois, above the foot path "Katilo" told Patrick Lime to go and observe if there was anyone at the house, Patrick Lime went through a foot path and go to the road at Anse Francois about 4 minutes Patrick came back and said that he had seen the old lady, Rene had told us that the lady liked to plant flowers in the

morning. …… that everyone had left and that the old lady was outside. Patrick told me let's go but I said I was not going, I would wait for them here where we where. They left me and I went high up and waited for them. They move closer up to the house and they began to change that is "katilo" put on a white pair of socks on his hands and a black t-shirt around his head and face …… Patrick put on a blue pair of socks on his hands and a black t-shirt around his head …… and he took the hammer and a pair of mason scissor, …… I saw Patrick Lime and "Katilo" climbed a wall of the house …… They went on the grass in the house's compound and …... walked on all fours this is to say hands and knees towards the house. …. A little while later Patrick Lime returned to me alone …… he said to me, "Katilo" asked you to hurry and come and not be long ……. I told Patrick I was not going to this place.

In **R v/s M (1966) SLR**it was held (1) that a court can only act upon statement made freely and voluntarily although subsequently retracted if there is independent evidence corroborating the statement in material particulars, (2) to corroborate a retracted confession all that is required is some evidence *aliunde* Implicates the accused in some material particular and which tends to show that what is said in the confession is probably true.

Freminot's statement is both exculpatory and inculpatory. In the case of **Pool v/s R**

(1974) SLRthe court took the view that there is no reason why a court should not accept and act upon admission made by an accused as against himself, though rejecting as untrue the part of the statement sought to implicate other persons. Hence the court used Mr Freminot's statement as against himself and not against any other accused. Further, as a general rule such evidence must be corroborated by evidence which itself does not require corroboration see **R v/s Marie (1973) SLR**. It is worth noting that Hubert Bristol's evidence and that of Port Louis corroborated Richard Freminot's statement in some material particular, with regard to the manner and the sequence in which the events of this case unfolded before 19th August 2003. However there was a slight difference in the timing of the said events which the court noted as gathered from the evidence that must have been due to the fact that these witnesses and Mr Richard Freminot were not accurate because they were just estimating the time taken for each event without looking at a watch. A few contradictions pointed out in the prosecution evidence were minor indeed and of no significance as they did not affect the material issues. **See Raymond Mellie V/s R SCA NO.1 OF 2005.** The prosecution witnesses were subjected to long sessions of thorough grilling by both defence counsel and, save for Andrew Sophola, I found the rest to be coherent, truthful and reliable.

It was submitted by both Mr Ally and Mr Elizabeth that Andrew Sophola, Hubert Bristol and Rene Port Louis are accomplices and therefore could not provide any corroboration to the confession by Freminot. Lord Simonds described the term "accomplice" to include participants in the offence charged, whether as principals or

aiders and abettors *(participes criminis*). **See Davies V/S Director of Public Prosecutions (1954) AC 357**.Obviously the defence was fearing the danger arising from the motive of avoiding or minimizing such witness's own involvement in the offence charged, and of emphasizing, or it may be, fabricating, that of the accused. However, the case of **The King v/s BaskervilleKB (1916) P.658** that "there is no doubt that the uncorroborated evidence of an accomplice is admissible in law as long as the court warns itself of the danger of convicting basing on that evidence. It was also stated that there is no statement of the exact warning to be given by the judge. This rule of practice has become virtually equivalent to a rule of law and in the absence of such a warning by the judge, the conviction must be quashed. **Rex v/s Tate (1908) 2KB P.68**Further, the corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime **See Baskerville (supra)**

Like I stated herein before there was no eyewitness or direct evidence to the commission of this offence. When questioned by the defence counsel ASP Reginald confirmed that he did not obtain any physical or forensic evidence from the scene of crime. None of the accused persons testified during the trial. Indeed they were not obliged to and no adverse inference has been drawn from their election to remain silent, which is perfectly in line with the constitutional rights enjoyed by an accused person. **See Article 19 (2) (h) of the Constitution 1993**This left the prosecution to entirely rely on circumstantial evidence. It was held in **Sauzier V/s Rep (1956-1962) S.L.R**that

"*where a case depends exclusively on circumstantial evidence, it is necessary for a trial judge to direct himself, expressly, that he must find, before convicting, that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt*." The prosecution has to exclude any alternative possibility that might point to the innocence of the accused **See Rep V/s Hoareau (1984) SLR**and, before drawing the inference of guilt from circumstantial evidence, the trial court should also be sure that there were no other circumstances weakening or destroying the inference of guilt. **See Onezime V/s Rep (1978) S.L.R.**

Evidence has been adduced to the satisfaction of the court that Cliff Emmanuel Richard Freminot and Patrick Lime had a meeting on the 18thof august 2003 at Mr Freminot's home where they all agreed to execute the plan to rob the house in question the following day. Richard Freminot confessed to this fact and to the effect that he went to the house but did not enter inside as he remained at the wall. Obviously he was trying to diminish his involvement in the crime or to completely erase his guilt. Cliff Emanuel was properly placed in this meeting by Hubert Bristol's evidence. Moreover, earlier on Port- Louis had been detailed to furnish Freminot and Cliff Emanuel with information and activities touching the occupants of that house which he did on several occasions. The robbery took place at the very house, date and time as per the plan and, the old woman alone, now deceased, was found at the premises where a number of valuable items listed in the charge sheet went missing. One now wonders what Freminot was

doing at, around or near this house at this time without the knowledge and or invitation of the occupants.

When the accused set out to execute their plan they very well knew that the old lady at the house was one of the impediments standing in their way, which they had to clear. The above discourse holds them equally and jointly liable. It is immaterial who dealt the fatal blow. Every one must be taken to have intended the probable and natural results of the combination of Acts in which he joined. But a different view was held by the court in **Duffey's case (1930) 1 Lewin 194**

> "If three persons go out to commit a felony, and one of them, unknown to the other, puts a pistol in his pocket and commits a felony of another kind, such as murder, the two who did not concur in this second felony will not be guilty thereof, notwithstanding it happened while they were engaged with him in the felonious Act for which they went out."

This is not the situation in the present case as there is no evidence pointing to the guilt of a single accused neither was the act, in the **Duffey case**, in some manner in furtherance of a common intention. **J.P Bishop on "Criminal Law", Vol 1(3rd Edition**) at page 439.supports the former position when he writes;

> "When two or more persons unite to accomplish a criminal object, whether through the physical volition of one, or of all, proceeding severally or collectively, each individual whose will contributed to the wrong doing is in law responsible for the whole, in the same way as though performed by himself alone."

Common Intention therefore implies a pre-arranged plan, prior meeting of minds, prior consultation in between all the persons constituting the group. It also means the *mens rea*necessary to constitute the offence that has been committed. In other circumstances it means evil intent to commit some criminal act, but not necessarily the same offence, which is committed. Be that as it may, common intention does not necessarily, and in all cases; imply an express agreement and pre-arranged plan before the act. The arrangement may be tacit and common design conceived immediately before it is executed on the spur of the moment. For example the accused could be found guilty for offences flowing from their actions if in the process of prosecuting a pre-conceived unlawful plan to rob they confine a person found at the premises and also block her mouth in order for her not to make noise or move or in any way disrupt their said business. There need not be proof of direct meeting or combination nor need the parties be brought into each others presence; the agreement may be inferred from circumstances raising a presumption of a common plan to carry out the unlawful

design. Common intention therefore is a question of fact. It is subjective but can be inferred from facts and circumstances. **see S.N. Misra on the "Indian Penal Code"page 96.**

In his written statement to police Mr Freminot also stated that when they reached the house he said *"…but I said I was not going I would wait for them here where we were."* A similar matter was dealt with by the **Privy Coucil**in the case of **Barendra Kumar Ghose V/s The Emperor 1925 A.I.R (P.C) 1** *facts are that a sub-postmaster was counting money in the back room when several persons entered the room, demanded him to give up the money and immediately afterwards fired pistols at him. He died. The assailants fled in different directions but Barendra, the appellant now, was chased and caught and charged with murder under section 302 read with section 34 (to establish common intention) of the Indian Penal Code. The appellant contended that he was standing outside and had not fired at the post-master. While dismissing the appeal Lord Sumner held that "Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things 'they also serve who only stand and wait'*

Perera, J discussed extensively the application of section 23 of the penal code and also cited some of these passages in the case of **R V/s Gaetan Sonny Rene and Others Crim. Side No.28 of 1998** which was upheld by the **Seychelles Court of Appeal.** In this case the complainant could not tell exactly who of the three persons that had

attacked and assaulted him did actually cut off the foreskin of his penis. It was argued by Mr Frank Ally for the Republic, and rightly so, that there was a common intention to commit the offence systematically since two of the accused firmly held the complainant as one of them cut the organ circumferentially. All three accused were found liable and convicted for the offence.

Fanchette Antat whose evidence was not challenged confirmed to court that the items listed in the charge sheet were stolen from her house, which had been ransacked on the 19/08/2003.These items have economic value that was estimated at 100,000 SR. and are things capable of being stolen. There is abundant circumstantial evidence to show that they were stolen at the time the accused herein were in Fanchette Antat's house and during, before or after the stealing force was used on the deceased, Norah Antat under whose custody and care the said items had been left. The items have not been recovered but on the very day they got lost Mr Freminot, as stated by Hubert Bristol, wanted and asked to sell him a flat computer screen computer which he had kept under a stone. The latter could not buy it because he had no money. Although one is free to keep their property wherever they want the court wonders why this particular screen was being kept under a stone and not in the seller's house if the same was not obtained feloniously. Moreover it was being marketed on the very day a flat computer screen belonging to Fanchette Antat was stolen; yet there is ample evidence that Mr Freminot and Cliff Emmanuel had planned to break into and steal from her house the same day, which incident did happen and a police dog tracked the scent and path of the intruders

from the house straight to the flat where Mr Freminot was found. Earlier on in the morning Jimmy Andre had seen Freminot coming from the same path. It should not be forgotten that this is the same venue (the flat) that hosted their meeting of 18th august 2003. Was this a coincidence?

All this cogent and incriminating circumstantial evidence irresistibly points to the accused's common intention to prosecute an 'unlawful purpose' or 'unlawful object'. The only logical and reasonable inference to make here is that Mr Freminot was one of the robbers in this case. He actively participated in the whole exercise, which was in furtherance of their plan with Mr Cliff Emannuel to break into and rob that house. Mr Cliff Emmanuel was party to the joint accomplishment of this criminal object and his will contributed to the wrong doing which in law makes him responsible for the whole crime as though performed by himself alone.

I think I would be right to deduce from these facts that before the robbery could be properly carried out there was need to confine the deceased, (and given the way she was tied, it must have been a concerted effort of a number of people) and also blind fold her not to see her assailants. The disorganized living room with scattered things, contrary to what Fanchette Antat left that morning, and the bruises on the deceased's body clearly indicate signs of a struggle and therefore use of force against the deceased. As already stated by the Pathologist, Norah Antat died of asphixia occasioned by mechanical causes. The circumstances of this case, which are incapable of any explanation, again point to the guilt of the accused persons herein as the ones who are liable for the manslaughter of Norah Antat, which is a probable consequence of the prosecution of their unlawful purpose. The court is convinced that no other person, save for the accused persons, could have visited that house on that morning before the arrival of Hans Marguerite PW 4 and his colleague Joe Zarine. He on that particular day, unlike other days when he reported for work at 9.00 am, arrived at the house at a time between 11.30 am and 12.00 pm because he had been buying construction materials in town and when questioned by the police he even presented to them his bus ticket which was still with him in the pocket. Therefore, in the absence of evidence that any person capable of committing the offences, other than the accused persons, was in the house at the material time on the day the offences were committed, the only inexorable logical inference is that the accused persons were, beyond reasonable doubt, the only persons present and that they committed these offences.

In conclusion therefore and after the court warning itself of the danger of relying and convicting on uncorroborated accomplice evidence, I find that these inculpatory facts

are incompatible with the innocence of Mr Richard Freminot and Mr Cliff Emmanuel and are incapable of explanation upon any other reasonable hypothesis than that of guilt. The court is satisfied that this inference of guilt has not been in any way or by any other circumstances weakened or destroyed and, it is further held that any other alternative possibility, if any, that might point to the innocence of the accused persons has been fully excluded by the prosecution. The prosecution has proved its case against both accused persons beyond a reasonable doubt. I find them guilty and accordingly convict each one of them as charged on each of the two counts.

Before I take leave of this matter I find it important, though onerous a duty, to say something regarding the conduct of these proceedings which have taken a whole three years with the accused persons remaining on remand since their arrest in august 2003. All the five judges of the supreme court have each, at one point in time had a go at this case and the reasons for their withdrawal from the same are clearly indicated on the record. In some instance, it reads, the accused took a very bad as well as hostile attitude towards the presiding judge. On numerous occasions they shouted and asked endless questions, walked out of the dock and became unruly making it difficult for the court to continue functioning in that fashion. Despite repeated pleas to them by their counsel and the judge the accused never heeded. About ten lawyers have appeared, on legal aid certificate, for the accused in quick succession as most of them got fired by the accused while others withdrew citing a conflict of interest-that it was just impossible for them to execute the accused's instructions. Some times only one accused attended court while on other occasions one of them intimated that he was sick and unfit to proceed with the case on that day. In the meantime the witnesses, one of them reporting from abroad, kept coming to the court in response to the summons with the hope to testify but only got turned away until early this year. Sadly one of the witnesses listed was reported dead while two others, former police officers were unable to return to the country to testify.

My turn came in February this year and I had to start the case afresh to listen to evidence from about twenty five witnesses in the main trial and the several trials within a trial. The cross examination was very thorough and long, at times taking two days for

a single witness. As we made progress into the hearing one of the accused, Mr Freminot escaped from lawful custody and has never been apprehended. Given the prevailing circumstances, and for reasons in the ruling of 2nd , 2006,I ordered that the trial continues in his absence. It should also be noted that this trial was fraught with objections and applications from the defence that at times required the court to adjourn and write a ruling. For a few times the case could not take off because of the non-representation by counsel of one of the accused. Reconciling the diary of the court with those of the prosecution as well as defence counsel to secure a convenient date for their attendance and continuation of the case proved to be one of the hardest tasks in this trial.

These are just a few of the factors that led to the numerous adjournments and consequent delay of the conclusion of this case. Here I shall be quick to state therefore that any person venturing to comment about this case before any forum and limiting themselves to only the aspect of the time it has taken before the courts without putting into consideration or explaining the above factors and others as against the constitutional provisions regarding speedy and fair trials and, bail would not be objectively and impartially assessing the situation and, inevitably is bound to reach (as it has already happened) a misleading and self-serving conclusion devoid of logic and merit. Such approach, in my view, would offer better guidance for future commentary and respect of the *sub judice*rule. Yes, justice delayed is justice denied. But in this context, each case should be judged on its merits and basing on the surrounding

circumstances.

D. GASWAGA

JUDGE

Dated this 18th day of October, 2006