

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CO 76/2008

[2013] SCSC

THE REPUBLIC

versus

DAVIS LESPERANCE

First Accused

IVANNIO VALENTIN

Second Accused

BERNARD PHILOE

Third Accused

Heard: 7-11-2011, 28-02-2013, 4-03 -2013,1-07 -2013,03 -09- 2013

Counsel: Mr. Chinnasamy, Principal State Counsel for the Republic
Mr. A. Derjacques Attorney at Law for the first accused
Mr. N. Gabriel Attorney at Law for the second accused
Mrs. K. Domingue Attorney at Law for the third accused

Delivered: 15 November 2013

JUDGMENT

Burhan J

[1] The aforementioned 3 accused were charged as follows;

Count 1

Statement of offence

Attempted Robbery contrary to Section 282 of the Penal Code read with Section 23 of the said Penal Code and punishable under Section 282 of the Penal Code

The particulars of the offence are that Davis Lesperance, Ivannio Valentin and Bernard Philoe on the 6th September 2008 at Anse Possession, Praslin assaulted Kevin D'unienville with intent to steal from him and at or immediately after the time of the assault used actual violence to the said Kevin D'unienville in order to obtain the thing intended to be stolen.

Count 2

Statement of offence

Acts intended to cause grievous harm contrary to Section 219(a) of the Penal Code and read with Section 23 of the said Penal Code and punishable under Section 219 of the Penal Code.

The particulars of the offence are that Davis Lesperance, Ivannio Valentin and Bernard Philoe on the 6th September 2008 at Anse Possession, Praslin with intent to do grievous harm unlawfully wounded Kevin D'unienville.

- [2] The 1st accused Davis Lesperance was acquitted at the no case to answer stage, while the 2nd accused Ivannio Valentin pleaded guilty to both counts and was sentenced to a term of five years imprisonment on count 1 and to a term of 5 years imprisonment on count 2. Both terms were ordered to run concurrently.
- [3] The 3rd accused denied the charges and the case proceeded to trial against him. The facts as borne out by the evidence of the prosecution are that the victim Mr. Kevin D'unienville had been returning from a night out on the 6th of September 2008 around 4 a.m, when he had been attacked by two persons with a piece of wood and a machete near

his home at Praslin. He had sustained bleeding injuries during the attack but had been able to fight back and drive his assailants away. He was able to grab the piece of wood and the machete from his assailants. He identified the 2nd and 3rd accused as his assailants in open court.

- [4] The victim had sustained injuries on his head, nose, right thumb and index finger and had been taken to hospital where his injuries were treated. He stated that the 3rd accused had a T shirt wrapped round his face but he was able to remove it and overpower him and pin him down at which time he was attacked by the other person with a machete. Under cross examination he stated he had identified the 3rd accused at an identification parade (pg 8 of the proceedings of 28th February 2013 at 9.a.m). He admitted he had been a little drunk that night. He stated he had not seen the 3rd accused prior to the date of the incident.
- [5] The victim's brother Alberto D'unienvile who had heard him calling out his name had come rushing out but had not been able to see or identify any of the attackers. His sister Doris D'unienvile too had come to the scene but she too had not seen either of the assailants.
- [6] The doctors namely Dr. Saha and Dr. Commettant who gave evidence together with the medical reports produced P6 and P6a corroborate the fact that the victim Kevin D'unienville did suffer injuries on his head, nose and fingers. The evidence given by James Tirant corroborates the fact that an identification parade was held in respect of the 3rd accused. The exhibits namely the piece of wood and machete and the bloody T shirt were identified by witness.
- [7] Thereafter the statement under caution of the 3rd accused was produced after it was declared admissible after a voire dire was held. It is trite law that as the statement had been retracted by the 3rd accused the material facts pointing to the guilt of the accused must be corroborated by independent evidence.
- [8] In his statement under caution recorded by the police, the 3rd accused Bernard Philoe stated that it was he who had the machete in his hand and it was the 2nd accused Ivanio Valentine who had the piece of wood. However it is apparent from the evidence of

witness Kevin D'unienville that the 3rd accused had attacked him with a piece of wood and not a machete and witness was able to identify him after he had put him on the ground and removed the T shirt from his face. He states he was thereafter attacked by another person with a machete (pg 8 of the proceedings of 28th February 2013 9.a.m).

- [9] I find that the facts in the statement under caution by the 3rd accused that he had attacked the victim Mr. Kevin D'unienville with a machete have not been corroborated by the evidence of the victim but in fact contradicted as according to Mr. Kevin D'unienville the 3rd accused had attacked him with a piece of wood and not a machete.
- [10] This creates a doubt in the identification made by the main witness Mr. Kevin D'unienville and it appears that the admissions made by the 3rd accused Bernard Philoe in his statement under caution are not corroborated as required by law but contradicted.
- [11] It was learned counsel for the defence contention throughout the trial that the victim's brother had played a part in the arrest of the 3rd accused and as the other persons at the parade were not of similar build to the accused who was substantially taller than the rest and the only one in the parade wearing a shirt, he stood out and therefore was easily identified. Further it is borne out in cross examination that the identification of the accused was done by the victim in somewhat difficult conditions, when he was a "bit drunk", at 4.00 a.m in the morning after a night out, when the face of the assailant was covered with a T shirt and fleetingly as he had to turn quickly to defend himself against the other assailant ***R v Turnbull (1977) QB 224.***
- [12] Therefore considering all the aforementioned facts and the contradictory versions in the case of the prosecution, a doubt arises in respect of the identity of the 3rd accused and as the prosecution has failed to corroborate the material facts pointing to the guilt of the accused in the retracted statement of the third accused, this court is satisfied that the prosecution has failed to prove the elements of the charge beyond reasonable doubt.

[13] The 3rd accused Bernard Philoe stands acquitted of the charges against him.

Signed, dated and delivered at Ile du Port on 15 November 2013

M Burhan
Judge of the Supreme Court