

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CO 58/2013

[2014] SCSC

THE REPUBLIC

versus

NABIL PADAYACHY of Plaisance, Mahe	[A1]
MIKHAEL CEDRAS OF Roche Caiman, Mahe	[A2]
ANDY MOUGAL of PLAISANCE, Mahe	[A3]
ALI PADAYACHY of Plaisance, Mahe	[A4]

Heard: 15/10/13 to 21/7/14

Counsel: Mr Kumar together with Mr Robert, State Counsel for the Republic
Mr Nichol Gabriel for the 1st Accused
Mr France Bonte for the 2nd Accused
Mrs Amesbury for the 3rd and 4th Accuseds

Delivered: 11 August 2014

JUDGMENT

McKee J

[1] A1, A2, A3, and A4 are charged with the following offences:

[2] **COUNT 1**
Statement of offence.

- [3] Attempt to murder contrary to and punishable under section 207[a] of the Penal Code read with section 23 of the Penal Code.
- [4] Particulars of the offence
- [5] Nabil Padayachy, Mikhael Cedras, Andy Mougal and Ali Padayachy along with one absconded person namely Darrel Poris known to The Republic on the 31st August 2013 at Victoria, Mahe with common intent attempted unlawfully to cause the death of Rudy Nick Maria of Mount Buxton, Mahe.

[6] COUNT 2
Statement of Offence

- [7] Acts intended to cause grievous harm contrary to and punishable under section 219[a] of the Penal Code as read with section 23 of the Penal Code.
- [8] Particulars of the offence.
- [9] Nabil Padayachy, Mikhael Cedras, Andy Mougal and Ali Padayachy along with one absconded person Darrel Poris known to The Republic on the 31st August 2013 at Victoria, Mahe with common intention unlawfully with intent caused grievous harm to Rudy Nick Maria of Mount Buxton, Mahe, namely, injured him in his body with a knife.
- [10] A1, A2, A3 and A4 [a juvenile] all pleaded not guilty to the charges and the matter proceeded to trial.
- [11] The prosecution called both oral and written evidence in support of the charges. This is referred to below. A1, A2 and A3 challenged cautioned statements given to the police and I held a *voire dire* into the special issue. I found that each statement had been voluntarily given and the three statements were also admitted into evidence. None of the defence counsel made a No Case to Answer Submission. I explained the election to each of the accused. All accused elected to remain silent. Each accused elected not to call witnesses. All Counsel made oral closing Submissions. Counsel for The Republic, Mr George Robert, and Defence Counsel, Mrs Amesbury also produced submissions in writing. Authorities were also produced.

- [12] The prosecution case was that PW1, Rudy Nick Maria, was involved in a fight at the Barrel Nightclub during the evening of 30th or early morning of 31st August 2013 from which he received injuries. The injuries required medical attention at Victoria Hospital He was accompanied there by a neighbour, PW2, Ted Perin Mohamed Francois. While both men were walking back from hospital to Mont Buxton the incident giving rise to these charges occurred in the area of the Roman Catholic Cathedral. It was the prosecution case that PW1 and PW2 were intercepted by a group of four men. PW1 was singled out and attacked as a result of his earlier involvement in the fracas at the Barrel restaurant. He received severe injuries and required hospital treatment again. The medical Report produced described the injuries sustained. PW2 was with PW1 when this confrontation took place. The accused were present in the area at the time in the company of another person or persons in a car serving as a taxi at the time. Each accused denied being a participant in the assault on PW1.
- [13] PW1 gave evidence and told the court of his involvement in the earlier fracas at the Barrel nightclub. He did not identify the other party involved. He received injuries and on his return home spoke with PW2 who agreed to accompany him to the hospital for treatment. On their way back to Mont Buxton on a stretch of road at the Roman Catholic Cathedral a car arrived at the scene and a number of men alighted from the car. He estimated that there were four in this group. The driver remained in the car. This group of men approached him and after ensuring he was involved in the previous incident in the restaurant proceeded to assault him. He says that he was struck with a machete and fell to the ground where he was further assaulted including being kicked. PW2 intervened, pulled him clear and both made their escape. PW1 told the court that when the four men approached him he saw A4 at the front of the group. He recognised A4 as a person he already knew and he could see his face. He also identified A2 in court as being in the group .He did not identify either A1 or A3 as being part of the group. At an earlier identification parade held by the police, PW1 had identified A2 . No identification parade was held in respect of A4.

- [14] PW2 corroborated the evidence of PW1 relating to his meeting with him in the early hours at home and thereafter accompanying him to hospital. He also told the court that he was with PW1 when a group of men approached them in the area of the Roman Catholic Cathedral. He was initially approached by one member of the group who spoke to him telling him not to intervene. He remained at the scene and had the opportunity to observe what occurred. He saw that the driver of the car remained in the vehicle. He told the court that all four men approached PW1, verified who he was and they started to attack him. He identified A2 in court as one of the group and the person who approached him and spoke to him. He told the court that he saw A2 grab the arm of PW1 and all four men then attacked him. PW2 saw PW1 down on one knee and it was his evidence that all of the men were on top of him as they attacked him. He assisted PW1 to escape and returned to hospital with PW1. While he stated that the area "was not well lit" he was able to identify A2 in a police identification parade as a member of the group since he had the opportunity to see A2 when they had the conversation. He also identified A2 in court. He made no further identification of persons at the identification parade or in court.
- [15] Formal police evidence was given regarding the identification parades, the recording of the cautioned statements and the taking of photographs. I accepted the evidence of the police officers in respect of these matters. I found that the three cautioned statements had been voluntarily given. These statements, the records relating to the identification parades and the photographs were admitted into evidence.
- [16] The medical report in relation to the injuries sustained by PW1 from this incident was produced by consent and admitted into evidence. This is referred to later in the judgment.
- [17] In his cautioned statement A1 said that he was a passenger in the car but did not leave the car. He was not in the group who approached PW1. A2 stated that he alighted from the car and was a member of the group who approached PW1. He spoke to PW1 and identified him as the person involved in the earlier incident. Thereafter he stepped aside when the assault on PW1 took place. A3 stated that he had been the driver of the vehicle but had not alighted from it during the incident. When the group of men returned to the vehicle he drove away from the scene.
- [18] PW1 and PW2 were cross-examined by all counsel.

- [19] In cross-examination by counsel for A1, PW1 admitted that on his way to the hospital after the first incident he had armed himself with two knives although these were later taken from him by PW2. In cross-examination by counsel for A2, PW1 said that A2 had fought with him and struck him with a pint.
- [20] Mrs Amesbury represented A3 and A4. She first questioned PW1 about the lighting conditions in the area since this incident occurred around 5am. PW1 stated that there was lighting in the area but conceded that none of the photographs produced showed public lighting poles. PW1 said that lighting also came from the Happy Youth Club which was opposite to where the confrontation took place. PW1 was also questioned regarding his identification of A4 and to his original interview with the police. In the interview shortly after the incident PW1 had referred to one of the assailants as a man known to him as Ali but without mention of his surname. PW1 further stated he did not know where Ali lived. Counsel suggested that in view of this limited information his identification was unreliable. In answer PW1 again said that he knew the person called Ali from before that night and he had been standing right in front of him on the night in question. He had only discovered his surname later. Finally PW1 agreed that when he was on the ground towards the end of the attack.
- [21] PW2 was also cross-examined by Defence Counsel. He confirmed to Counsel for A1 that he only identified A2 during an identification parade. He told counsel for A2 that he saw A2 grab the arm of PW1 to assist in his identification. It was suggested to him that there was limited lighting. PW2 stated that he could see PW1 being attacked and later on the ground as the attack continued. In cross-examination by counsel for A3 and A4 PW2 stated that during a conversation after the incident PW1 had told him that he could identify Ali as an assailant. In answer to a question regarding the lighting he stated that there was lighting, but the incident did not take place immediately under a street light. He agreed he could identify A2 as a member of the group since A2 had been closest to him and had spoken to him. He agreed that when PW1 was on the ground, PW1 was shielding his face. He stated that the driver of the car remained in the vehicle through the confrontation.

- [22] I have particularized the above evidence and have also considered all the evidence before the court.

DIRECTIONS

- [23] I remind myself that the prosecution bring this case and is required to prove the guilt of EACH accused beyond reasonable doubt; the accused have nothing to prove. I remind myself that each accused had the right to remain silent and no inference can be drawn in relation to each accused remaining silent and his election not to give evidence nor call witnesses. Furthermore I am required to consider the evidence that I do accept in respect of each accused and decide if that satisfies me of the guilt of that accused to the required standard.
- [24] I remind myself that the statement to the police by one accused is not evidence against a co-accused.

EVALUATION of EVIDENCE

- [25] It is not disputed that PW1, Rudy Nick Maria, had a dispute and fight with an unnamed person in the Barrel restaurant and bar during the evening of 30th August 2013 from which he received injuries which required hospital treatment. He was accompanied to hospital by an acquaintance, PW2, Ted Mohamed Francois.
- [26] It is not disputed that around 5am on 31st August 2013 PW1 and PW2 were together and returning to their residences at Mont Buxton area; that their route home took them in the area of the Roman Catholic Cathedral; that a vehicle drew to a halt in their immediate vicinity and a number of men emerged and approached PW1 and PW2. I find four men alighted from the vehicle.
- [27] It is not disputed that there was a confrontation involving PW1 only after he was identified as the person involved in the earlier incident at the Barrel restaurant. PW2 was only a bystander and not directly involved.

- [28] PW1 was attacked and received serious injuries which again required hospital treatment.
- [29] By virtue of the cautioned statements admitted into evidence after *voire dire* proceedings I find that A1, A2 and A3 were in the said vehicle. I find by their admissions in the cautioned statements that A3 was the driver and A1 and A2 were passengers along with another or others in the vehicle.
- [30] I look to the evidence of PW1 and PW2 together with the cautioned statements of A1, A2 and A3 in respect of the allegations that all four accused participated in the assault on PW1.
- [31] Mrs Amesbury principally focused on whether there was adequate lighting in the area for PW1 and PW2 to make a proper identification of any member of the group who approached them. In this regard I warn myself to fully consider, which I do, the special need for caution and take into account the “Turnbull Guidelines” in respect of the identification evidence..
- [32] PW1 told the court there was street lighting in the area although he could not see street lights in the photographs produced to the court. He stated further that lighting from the Happy Youth Club directly across the road reflected to the place of the incident. PW2 stated that the incident took place around 5am when it was still dark. He stated that the lighting was not so good but that there were lights although they were not directly below them. I look for other supporting evidence as to the adequacy of lighting for a proper visual identification to be made. PW2 stated that he could identify A2 since he stood close to him. This would be done under the prevailing lighting conditions. In his cautioned statement A2 confirmed that he disembarked from the car and ran to where PW1 was. This means that A2 could see PW1and PW2 in the available light.Hence A2 collaborates PW2’s evidence. I look further to the evidence. In his cautioned statement A1 stated that he saw members of his group approach PW1. In his cautioned statement A3 said that he saw PW1 and PW2 from the car. In his cautioned statement A2 said that when he approached PW1 he could see that his hand was bandaged. In view of the all the above evidence I find that there was adequate lighting in the area for all these sightings to be made. I find that this lighting was sufficient for PW2 to correctly identify A2. I hence find that A2 was present and part of the group which confronted PW1.

- [33] Looking at all evidence before the court in respect of the lighting in the area I can find that there was sufficient light for PW1 to identify the persons who approached and spoke to him. PW1 identified A2 as part of this group. Again his evidence of A2'S presence is corroborated by A2 himself in his cautioned statement. I find that PW1 correctly identified A2.
- [34] I find that PW1 and PW2 were telling the truth when they said that they saw A2 there.
- [35] I accept that the identification by PW1 and PW2 was good because there was sufficient light emanating from nearby light sources in the area, namely a street light or lights and from the nearby youth club. This lighting was also available for PW1 as he looked at the members of the group facing him.
- [36] PW1 told the court that he could identify the fourth accused [A4] as part of this group. He stated that A4 stood in front of him and that he recognized him since he already knew him. He knew his name to be "Ali". I find that there was sufficient light for PW1 to identify a person standing in front of him. Mrs Amesbury stresses that the identification of Ali was a dock identification. There had been no prior identification parade relating to A4 and hence this dock identification was of little or no value. However this was not the identification in the dock of a prior unknown person. PW1 was saying that he saw the face of the person standing in front of him and he recognized him as a person known to him as Ali. In the court he is saying that he recognized the person who was standing there as the fourth accused and that he was the same man that he recognized on the night in question. In these circumstances I warn myself that I have to look carefully at the circumstances surrounding this identification and whether PW1 could be mistaken. I find that the lighting conditions were sufficient for PW1 to see the face of a person standing right in front of him. This was not a fleeting glance. There was a short time gap before the assault started and this will give PW1 time to see the face of the person. He recognized the man. His observation was not impeded. I find that the observation was made in satisfactory conditions. I find that PW1 was truthful on this point and made a correct identification. I find that the man he knew as Ali stood in front of him and that that man is A4, the fourth accused.

- [37] Neither PW1 nor PW2 identified A1 or A3 as part of the group which advanced on PW1. In his cautioned statement A1 said he was a passenger in the car but remained in the car. In his cautioned statement A3 said that he was the driver of the car and again did not alight from the vehicle.
- [38] On a review of all the evidence I find that there is insufficient evidence before the court for it to infer that at the time the car left the Barrel restaurant there had been a joint decision amongst all its occupants that they would “cruise the streets” looking for PW1. I find that the sighting of PW1 was by chance but the opportunity was taken to go to PW1. A1 and A3 remained in the car while the others left. In these circumstances I find that it could not be said that A1 and A3 had formed a common intention with those persons who left the car to confront and assault PW1.

JUDGMENT in respect of NABIL PADAYACHY [A1] and ANDY MOUGAL [A3]

- [39] I find that there is no evidence against A1 and A3 in respect of either of the charges, namely Attempted Murder and Causing Grievous Harm and accordingly A1 and A3 are found Not Guilty and Acquitted on both of the charges against them.
- [40] I now look at both charges as they relate to Michael Cedras [A2] and Ali Padayachy [A4].
- [41] In respect of A4, a juvenile, Mrs Amesbury submits that the production to the court late in the prosecution case of the Written Consent of the Attorney General [the AG] to prosecute A4, a juvenile, is in breach of the provisions of the Children Act and fatal to his prosecution. She argues that the Consent in Writing should have been produced to the court at the commencement of the case. I can confirm that when the Consent in Writing was produced to the court I admitted it into evidence. I find that in the Letter of Consent the AG has given authorization for the prosecution of A4 to proceed. The Letter of Consent is dated the 28th day of January 2014. A4 first appeared in Court on 28th January 2014. The remaining accused was not present on that day. I have consulted the record of proceedings. This was an application for a remand in custody. Mr Kumar represented The Republic and Mr Joel Camille represented A4. I advised A4 that, although he was a juvenile, he would be tried jointly with the three adult co-accused. He was advised of the

two charges he would face. The matter was adjourned to 4th February 2014 with A4 remanded in custody.

- [42] On 4th February 2014, A4, along with the other accused, appeared before me. Mrs Amesbury appeared as substantive counsel for A4 and has continued to represent him throughout the trial. On that date Mr Kumar advised the court that the necessary documents including the written consent to prosecute from the AG in terms of section 92 of the Children Act had been served on Mrs Amesbury. Mrs Amesbury confirmed to the court that she had been served with a copy of the fiat. At that early stage I was also aware that the AG had granted his consent to prosecute as had the remaining accused and their counsel. It was only after this disclosure that pleas were taken.
- [43] I look to the case of R v Sayid [Seychelles Court of Appeal case 2/2011] and in particular to paragraph 17 of the Judgment of JA Twomey on the matter of AG's Consent to prosecute. In this case she found that this consent could be given in writing or orally at the initiation of criminal proceedings. Mr Kumar told the Court that when he received the police file early on the 28th January he then advised the AG of the age of A4 and requested his consent to prosecute. The AG was thus aware that A4 was to be indicted and issued his Written Consent dated 28th January. By 4th February 2014 I was aware that consent to prosecute had been given. Mrs Amesbury for A4 was also aware of this decision. I find that section 92 [1] [b] of the Children Act has been complied with. This was brought to the notice of the court before plea was taken. There was nothing irregular about this later submission of the written consent of the AG. It has the effect of confirming the earlier oral information given to the court. I dismiss the submission made by Mrs Amesbury that the late submission of the written consent renders the prosecution of A4 a nullity. The case against A4 will proceed.
- [44] Hence A4 and A2 continue to face both charges.
- [45] At this juncture I look at COUNT 1 in relation to these accused. Each accused is charged with the offence of attempted murder in that they, with others, *and with intent* [my italics] attempted to cause the death of PW1. In my opinion there is insufficient evidence before the court to show that the Prosecution has proved to the required standard the necessary ingredient of intent in so far as each accused is concerned.

- [46] Accordingly A2 and A4 are found Not Guilty and Acquitted on COUNT 1 - Attempted Murder.
- [47] I now look to Count 2. Mrs Amesbury raises a primary objection to the wording of the Statement of Offence. She relies on the findings in the SCA case **Jude Evans Jules SCA No 11 of 2005**. As I understand the position in that case, the appellant was charged with a contravention of section 135 [1] of the penal code. Section 135[1] relates to an offence of committing an act of indecency towards another person who is under the age of fifteen years. However when the charge was laid the drafter alleged that the appellant had committed an offence of sexual interference with a child. It has to be said that the particulars of the offence followed the correct wording. The drafter of the statement of offence had followed the wording in the marginal note attached to section 135 and was in error. A conviction for a supposed offence of sexual interference with a child does not in any way equate with a charge relating to an act of indecency. The court found that there was no offence of sexual interference with a child. Hence it followed that the conviction was for a non-existent offence and it was set aside.
- [48] In the present matter Mrs Amesbury submits we are faced with a similar situation in that the drafter of Count 2 in the present indictment has blindly followed the wording on the marginal note and, as in the Jules case, there is a fundamental error and both accused should be acquitted.
- [49] In the present matter A2 and A4 are charged under section 219 of the penal code. The drafter has a choice. He may allege that the offence, with intent, was to [1] maim any person, [2] disfigure any person, [3] disable any person, [4] do some grievous harm to any person or [5] resist or prevent the lawful arrest or detention of any person. In this case the drafter elected option [4] “to do some grievous harm to any person”. This option is followed on in subsection [1] where the option selected was “unlawfully do any grievous harm to any person by any means whatever”.
- [50] The margin note to section 219 reads “Acts intended to cause grievous harm or prevent arrest”. The words “to prevent arrest” are not included in the statement of offence in Count 2.

- [51] I now look at Count 2. The words “to cause grievous harm” are used. The words in section 219 and 219[a] are “to do some grievous harm or to do any grievous harm”. The drafter of the present statement of charge has used the words “to cause” rather than the words “to do”. Mrs Amesbury would argue that when the words “to cause” are used this is a non-existent offence. I refer to paragraphs 6 and 7 of the Jules judgment and the words of Lord Bridge. I quote from the second sentence in paragraph 6 – “*But if the statement and particulars of offence can be seen to fairly relate to and to be intended to charge a known and subsisting criminal offence but plead it in terms which are inaccurate, incomplete or otherwise imperfect, then the question is whether a conviction on that indictment can properly be affirmed..... it can be said with confidence that the particular error in the pleading cannot in any way have prejudiced or embarrassed the defendant*”. I apply the above rationale to the present matter and the reasoning in paragraph 7. This charge uses the wording “to cause grievous harm” not “to do grievous harm”. The difference in wording in the statement and particulars of offence is minor and in no way misleading. It has not prejudiced or embarrassed A2 or A4. I find that there is no material defect in Count 2. I reject the submission by Mrs Amesbury on this point. Count 2 will continue as against A2 and A4.
- [52] I find that PW1 and PW2 are reliable and credible witnesses. I find that PW1 and PW2 saw A2 at the scene. I find that PW1 saw A4 at the scene. I find that A2 and A4 were amongst the group of four men who approached them. In making this finding I dismiss from my mind all reference to A4 as it appears in the cautioned statements of A1,A2 and A3. I find that after an initial conversation between PW2 and A2 PW1 was identified as the man involved in the earlier trouble at the Barrel restaurant. I find that PW2 was told to stay out of the encounter and he did so but remained immediately nearby as an onlooker. I find that PW2 is telling the truth when he said that he then saw all four persons immediately surround and start to assault PW1. In his cautioned statement A2 stated that having made the initial check on the identity of PW1 he stepped back and took no further part. I do not believe him on this point. I find that A2 fully participated and took an active role in the joint attack on PW1. The force of the attack drove PW1 to his knees. Even then the attack continued until PW2 managed to intervene and drag PW1 clear. PW1 and PW2 escaped and the four men returned to their vehicle.

- [53] After the attack the extent of the injuries sustained by PW1 came to light. He was transported to hospital in a near unconscious state. He received immediate medical attention and was admitted for a period of some two weeks. The medical report admitted by consent shows the extent of the injuries. PW1 was admitted in an unstable state and in shock there were multiple lacerations on his head, neck, right shoulder, chest, left forearm and hand. The extent of these injuries can clearly be seen in the final nine photographs of the album. I am satisfied that these lacerations were inflicted with a knife or like sharp instrument.
- [54] On consideration of all the evidence I find that from the time the four persons emerged from the car they had formed a common intention and embarked on a joint enterprise to confront PW1 and once duly identified, attack and assault him. It must have been evident to each that when four men assault one man the chances of severe injury are likely. This was a revenge attack in return for PW1's earlier involvement with a friend of one of the group. During this assault PW1 was repeatedly stabbed or struck with a knife or other sharp object which caused the said injuries. There are a series of four photographs depicting a wound running from the back of the head down to the neck. This injury is consistent with PW1 being stabbed or slashed while he was in the kneeling position. There is also a laceration close to the left eye of PW1. While there is no evidence that A2 or A4 wielded a knife, I find, as testified by PW2, that A2 and A4 were amongst the men surrounding PW1 and to use PW1's words "kept hitting and stomping on him". I take "stomping" to mean kicking him. A2 and A4 participated throughout the assault from its inception until PW2 intervened. They actively supported the attacker wielding the knife. Neither A2 nor A4 retreated after the assault started. There is no evidence that either A2 or A4 tried to discourage the others from attacking PW1. There is no evidence that either A2 or A4 tried to discourage the attacker who wielded the knife. I find that there was a common intention amongst all four men was to cause real injury to PW1. A2 and A4 fully participated in this joint enterprise to inflict injury on PW1. Grievous harm means really serious bodily harm. The injuries sustained by PW1 amounted to really serious bodily harm.
- [55] Where several persons inflict injuries on a victim it is the totality of the injuries which are to be considered in the charge of grievous harm. By participating in the attack A2 and A4

were aiding the commission of that element of the attack which caused the injuries resulting in the grievous harm suffered by PW1. A2 and A4 are liable for the acts done in pursuance of the joint enterprise.

I find that the prosecution has proved each and every ingredient of the offence beyond reasonable doubt. Accordingly I find MICHAEL CEDRAS [A2] and ALI PADAYACHY [A4] GUILTY and CONVICT each of them of the offence of doing grievous harm contrary to section 219[a] of the Penal Code.

Signed, dated and delivered at Ile du Port on 11 August 2014

C McKee
Judge of the Supreme Court