

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CO CR10/2013

[2018] SCSC 138

THE REPUBLIC

versus

JEAN-PAUL BISTOQUET

First Accused

FRANCIS ANDRADE

Second Accused

Heard: 12, 13 Feb. 29 April 2015, 20 Feb. 14 March, 20 July, 2 October 2017

Counsel: D Esparon, Acting Attorney General for the Republic
A Amesbury for the accuseds

Delivered: 18 January, 2018

JUDGMENT

Dodin J

[1] On Wednesday 29th August, 2012, Prakash Chetty in the company of Christopher Nanon, Ted Nanon and Ronny Quatre went to Beau Vallon at around 7.30pm where a fair known as Bazaar Labrin is held every Wednesday. They were in car registration S9579 belonging to Prakino's Car Rental. After parking for some time near the basketball court, Ted Nanon and Ronny Quatre took car S9579 and went to the shop to buy drinks. Whilst they were away another car driven by the 1st Accused, Jean-Paul Bistoquet in the

company of the 2nd Accused Francis Andrade, Barry Kilindo, Patrick Labrosse, Betty Marie and her infant son arrived at the fair and parked in the spot just vacated by S9579. The occupants of the car went to the fair for a while before returning to the car. Whilst they were away, Ted Nanon and Ronny Quatre had returned in car S9579 and parked the same behind the car driven by the 1st Accused blocking its exit.

- [2] There followed heated arguments between the occupants of the two vehicles including threats and obscene language from both sides. Eventually, the verbal quarrel abated and the offending vehicle moved allowing the 1st Accused to extract his vehicle and left the scene with his passengers.
- [3] At around 9:45pm to 10pm, Prakash Chetty and his friend were still at Bazaar Labrin when he was struck with a machete to the head and he fell to the ground fending off several other blows of the machete which resulted in further injuries to his hand and belly. At the same time another person attacked Christopher Nanon with a catapult hitting him in the chest. The man who had wounded Prakash Chetty also attacked Christopher Nanon but missed and that man used the machete to cause damage to car S9579.
- [4] Prakash Chetty was taken to Seychelles Hospital and admitted for 1 week after which he underwent another 2 ½ months treatment at the Apollo Hospital in Mauritius. He had sustained the following injuries; deep laceration wound to the head, deep laceration to the left elbow, trauma and deep laceration of left thigh, line abrasions of left knee and chest. Vehicle S9579 sustained damaged to the windscreen, left rear door frame. Some days later, Ted Nanon came across the photographs of the Jean Paul Bistoquet and Francis Andrade whilst using his sister's computer. He printed them and took to the police as the persons who had attacked them on that night. On 6th September, 2012, both accused were arrested by the police and released after they both gave under caution statements.
- [5] On the 3rd December, 2012 both accused were again arrested and taken for identity parade after Prakash Chetty had returned from medical treatment. Both accused persons refused to take part in the parade. However the police considered it had enough evidence to charge them as follows:

Count 1

Statement of Offence

Committing an act with intent to cause grievous harm to a person with common intention contrary to Section 219(a) of the Penal Code read with Section 23 of the same act and punishable under Section 219 of the Penal Code.

Particulars of Offence

Jean Paul Bistoquet and Francis Andrade on the 29th August 2012 at Beau Vallon, Mahe with common intention and with intent to cause grievous harm to Prakash Chetty caused grievous harm to the said Prakash Chetty.

Count 2

Statement of Offence

Wilfully and unlawfully damaging the property with common intention contrary to Section 325 (1) of the Penal Code read with Section 23 of the same act and punishable under Section 325 (1) of the Penal Code.

Particulars of Offence

Jean Paul Bistoquet and Francis Andrade on the 29th August 2012 at Beau Vallon, Mahe with common intention wilfully and unlawfully damaged property namely car registration number S9579 belonging to Prakino's Car Rental.

- [6] The case for the prosecution is that the two persons who attacked Prakash Chetty and Christopher Nanon and damaged car S9579 were the 1st and 2nd Accused persons. From the evidence adduce by the witnesses called for the prosecution, Christopher Nanon testified that although it was at night, there was sufficient light where the incident took place which was close to a floodlit basketball court. He noticed the 1st Accused after Prakash had fallen to the ground and he was able to identify the 2nd Accused as the person who was using the catapult to hit him. He was about 7 meters from Prakash Chetty at the time.
- [7] Ronny Nanon testified that he saw the 1st Accused wearing a black jacket and had a machete and the 2nd Accused was wearing a green t-shirt. He maintained that there was sufficient light to see both accused persons well. Ted Nanon testified that he was sitting in the car when the two persons attacked Prakash Chetty and him. He saw the person who hit Prakash Chetty with the machete maintaining that it was the 1st accused who also attacked him with the machete causing damage to the car. He testified further that he was

face to face with the 2nd Accused who hit him with the catapult to his chest. He testified that at the time he did not know the names or identity of either accused persons but some days later when he was using his sister's computer he came across the photographs of the two accused persons and recognised them as the persons who had attacked him and Prakash Chetty. He printed the photos and took them to the police.

[8] Prakash Chetty also testified that during the first encounter with the two accused, he had good opportunity to observe the 1st accused who was the driver and the 2nd Accused who was a passenger in the back seat. After he was hit over the head he fell on his back and whilst fending off other thrusts of the machete he could identify the 1st accused as the person attacking him with the machete.

[9] Both accused persons gave under caution statements regarding the incident. The statement of the 1st Accused reads:

“I went to Beau-Vallon Labrin last Wednesday. Upon reaching the parking area a young man approached me and instructed me not to park where I was parking, because according to him the parking was reserved. I parked the car anyway knowing that this parking was not served by the authority. I proceeded the place where Bazar was taking place together with my girlfriend and my son. When we returned to the car I saw that my car had been blocked by other car so that I could not get out of the parking area. A few young men started an argument with us saying that we should not have parked in this particular parking space. I called the police twice that evening requesting for assistance so that I could get out of the parking. The police never turned up after some time someone removed the car that was blocking mine. And at that instance I moved out of Beau-Vallon and took my son and girlfriend to watch the musical show in town Stad Popiler. After about 20 minutes we left Victoria and went home to sleep.”

[10] The statement under caution of the 2nd Accused reads:

“On Wednesday the 29th of August 2012, I went to Beau Vallon at the Bazaar Labrin. I went in a car and I'm not ready to say who was driving and the passengers who were in that car. Upon arriving at Beau Vallon in a border near a court I have parked and I wish to point out that I was not the one driving. I don't drive. After we have parked a male came towards the direction where we have parked our transport, that guy addressed the driver saying that this is his parking space. At that time me and the other people in the car had already disembarked and were going towards Bazaar Labrin and that was around 1800hrs, there was also a little baby

with a woman in my company. Upon arriving in the area where Bazaar Labrin is being held we bought mango salad and afterwards we went back to where our transport was parked, Upon arriving where we have parked I saw that three cars have obstruct the car that we were in, two on each sides and one in the front. A man told us to fly our car out and this man was saying this when we were coming towards our car. At that time there were several people near the car and then an argument arose between the group of people who were there and those who were with me. The argument went on for about thirty minutes to one hour and I heard the man who told us to fly saying lots of vulgar words such as swear words. That man addressed me and I told him that he's not from my "rank". Afterwards our transport left after one of the two transports have moved for us to be able to leave."

- [11] The 1st Accused also made a dock statement essentially repeating the content of his under caution statement. Three defence witnesses were also called to testify. Barry Kilindo testified that on the 29th August, 2012 he took a lift in a car driven by the 1st Accused at Point Larue and they went to Victoria and then on to Beau Vallon where they visited the Bazaar Labrin. They spent about half an hour before returning to the car which had been blocked by another vehicle. There followed some heated arguments with the occupants of the other car and they left after the offending vehicle was moved. They went to Victoria where they spent some time before going to Anse aux Pins where the 1st accused dropped him and the 2nd accused at their respective homes at around 11pm.
- [12] In cross-examination, the witness stated that in the car with him were the 1st accused who was driving, the 2nd accused, the girlfriend of the 1st Accused and an infant child of the 1st Accused. He stated that they arrived at Beau Vallon at around 6pm and left at around 9 to 10 pm.
- [13] Patrick Labrosse testified that on the 29th August, 2012, he saw the 1st and 2nd Accused in Victoria at around 6pm. He took a ride in the car to Beau Vallon in the company of the 1st and 2nd Accused, the girlfriend and child of the 1st Accused and one Barry. At Beau Vallon they went to Bazaar Labrin where they spent around 15 to 20 minutes before they returned to the car. At the place where the car was parked there developed an argument between the 1st Accused and another man and both men were swearing at each other. After that they got in their car and left at around 9pm and went to a show in Victoria. They left the show at around 11pm and after dropping off the 2nd Accused and Barry, at Anse aux Pins, the 1st accused dropped him off at his home at around 1130pm.

- [14] Betty Marie testified that she is the girlfriend of the 1st Accused. On the 29th August, 2012, the 1st Accused picked her up. She was with their infant son. They went to Anse aux Pins where they picked up Francis, then on the way to Victoria, they picked up Barry at Point Larue and Patrick in Victoria. They then proceeded to Beau Vallon Bazaar Labrin. They parked and went to the stalls and when they returned another car had blocked theirs. After some arguments and swearing, someone moved the other car and they were able to leave. They went to a show in Victoria from around 9pm to 9:30pm and stayed there until around 11pm. The child was playing and running around but in cross-examination, the witness stated that at Beau Vallon the child was not sleeping but was crying and when they were in Victoria the child was sleeping on the back seat of the car until they returned to Anse aux Pins and dropped off the other persons. She stayed at home with the 1st Accused that night.
- [15] Learned counsel for the prosecution in his final submission maintained that the evidence showed that initially there were arguments and verbal exchanges in regard to a parking space between the victim Prakash Chetty and at least the 1st Accused. Subsequent to that Prakash Chetty was standing and speaking to one Mr Alvis when he felt a blow to his head. At that time he did not know what it was but upon falling down still he saw the 1st accused Jean-Paul Bistoquet with a machete as he was trying to block the blows being given to him whilst on the ground. Learned counsel submitted that the evidence of Prakash Chetty is corroborated by the evidence of Ted Nanon, Christopher Nanon and Ronny Quatre.
- [16] Learned counsel further submitted that in addition to the evidence of Christopher Nanon and Ted Nanon that the complainant Prakash Chetty received several blows blow with a machete they also gave evidence to the fact and identify that the 2nd Accused was with what we call a sling (“*fles*”) and he was actually shooting in all directions and one of the witnesses received a hit from one of the sling shots in his chest. Both of them went to take refuge behind a car where they were they could see clearly the 1st Accused coming towards the car behind which they have sought refuge which was car number S9579. Learned counsel submitted that from where the two witnesses were they actually observed the 1st accused hit the car with a machete as well as observed the 2nd Accused still using his sling shots and firing everywhere and also made hits on the same car.

- [17] Learned counsel submitted that the evidence has established the element of common intention as regards to both accused in respect to both counts in that both accused persons after having had the verbal exchange had left the scene and quite some time after came back and perpetrate the act. Learned counsel submitted that the weapons used and the number of blows which the victim Prakash Chetty received from the machete show that there was an intention to cause grievous harm to Prakash Chetty.
- [18] In respect of the evidence adduced by the defence, learned counsel for the prosecution submitted that the witnesses were mainly friends of both the Accused persons and they stated that they would not like to see both accused persons go to prison which showed some form of bias in the evidence of the defence and showed that they were not credible witnesses. Learned counsel submitted that there were contradictions and inconsistencies as to how many people were in the car and as to what was the baby doing at that time or at the musical show in Victoria.
- [19] Learned counsel further submitted that even if the Court was to take into account the time the accused persons first left Beau Vallon, there were sufficient time for both accused persons get to Victoria then go to Anse aux Pins and come back and still have committed the act, as charged in count 1 and count 2.
- [20] Learned counsel concluded that the prosecution has proved its case beyond reasonable doubt against both accused persons on both counts and moved the Court to find both accused persons guilty on both counts and to convict them accordingly as charged.
- [21] Learned counsel for the defence did not venture any final submission leaving the Court to give judgment based on the evidence before it.
- [22] Section 219 of the Penal Code states:

219. Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person-

(a) unlawfully wounds or does any grievous harm to any person by any means whatever; or

(b) unlawfully attempts in any manner to strike any person with any kind

of projectile or with a spear, sword, knife, or other dangerous or offensive weapon; or

(c) ...

(d) ...

(e)...

(f) ...

(g)...

is guilty of a felony, and is liable to imprisonment for life.

[23] Section 325(1) of the Penal Code states:

325. (1) Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and he is liable, if no other punishment is provided, to imprisonment for two years.

[24] Section 23 of the Penal Code states:

23. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such 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.

[25] The evidence adduced by the Prosecution and defence has established clearly that on the 29th August, 2012, after 7:30pm the 1st Accused and the complainant/victim had a heated argument with regard to a parking space at Beau Vallon near the basketball court which lasted well over half an hour. Both the 1st Accused and the complainant/victim had in their company other persons but it is not clear how involved they were in the exchange other than they witnessed closely what happened and who were present. The evidence also established that despite there being threats and offensive languages being employed by both sides, there was no physical violence. No charge arose out of that incident.

[26] The evidence also established without doubt that two persons attacked the complainant/victim on the same night at around 9.45pm to 10pm and also caused damage to vehicle S9579. The evidence of the prosecution is that the acts were perpetrated by the 1st and 2nd Accused whilst the defence maintained that it could not be the accused persons

as they had already left and never returned to Beau Vallon that evening. This requires this court to make two crucial determination based on the evidence before it:

1. Identities of the perpetrators; and
2. Alibi defence of the accused.

[27] The leading case in identification and the pitfalls that may lead to injustice is *R v Turnbull and others - [1976] 3 All ER 549*. The judgment read by Lord Widgery in that case also touched on the impact of alibi as this current case also does. The guidelines set out as directions to a jury have relevant application to a trial judge and consist of the following:

- i. Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused – which the defence alleges to be mistaken – the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification(s). The judge should tell the jury that:
 - caution is required to avoid the risk of injustice;
 - a witness who is honest may be wrong even if they are convinced they are right;
 - a witness who is convincing may still be wrong;
 - more than one witness may be wrong;
 - a witness who recognises the defendant, even when the witness knows the defendant very well, may be wrong.
- ii. The judge should direct the jury to examine the circumstances in which the identification by each witness can be made. Some of these circumstances may include:
 - the length of time the accused was observed by the witness;
 - the distance the witness was from the accused;
 - the state of the light;
 - the length of time elapsed between the original observation and the subsequent identification to the police.
- iii. It is commonly accepted that recognition is more reliable than identification of a stranger; however, even when the witness appears to

recognise someone he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

- iv. If the quality of identifying evidence is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. When, in the judgment of the trial judge, the quality of the identifying evidence is poor, the judge should withdraw the case from the jury and direct an acquittal, unless there is other evidence which supports the correctness of the identification. The trial judge needs to tell the jury which evidence they believe is capable of supporting the evidence of identification.
- v. If there is any evidence or circumstances which the jury might think was supporting when it did not actually have this quality, the judge should say so.

[28] With regard to the scope of the Turnbull guidelines following were noted by their Lordships in the judgment:

- i. A Turnbull direction need not be provided unless the prosecution case depends wholly or substantially on visual identification.
- ii. Where the principle or sole means of defence is a challenge to the credibility of the identifying witness, there may be exceptional cases in which a full Turnbull warning is unnecessary or may be given more briefly than in a case where the accuracy of identification is challenged.
- iii. Paying lip service to the guidelines will not be enough, nor will it suffice to give a general warning without detailed references to any particular circumstances that may have affected the accuracy of the witnesses' observation. However, the guidelines do not require the slavish use of a rigid form of words in every case and a judge may properly point out that a mistaken identification does not necessarily prove that the accused is innocent or that the witness is untrustworthy in other respects, especially if his view of the crime was imperfect.
- iv. The guidelines may also need to be followed in cases the disputed identification of an alleged accomplice and an inadequate direction in respect of the evidence against one accused may render unsafe the

conviction of another, although this will depend on the circumstances of the particular case.

- [29] Having carefully appreciated the directions and impact of the Turnbull guidelines and having considered the evidence led by the prosecution as set out above, I find that the evidence of the prosecution witnesses, namely Ted Nanon, Christopher Nanon, Ronny Quatre and Prakash Chetty were not shaken or contradicted at all. The witnesses remained credible and cogent throughout. I keep in mind however that by maintaining a simple defence of alibi, the essence of the accused persons defence still comes down to since they were not there at the relevant time, therefore the identification must be wrong or mistaken.
- [30] I now look at other evidence capable of supporting a disputed identification. Such evidence may take any admissible form but the Court must also keep in sight that even if it is proved that an accused lied about where they were at the relevant time does not automatically prove they were committing the offence at the time. However, if the Court is satisfied that the sole reason for the false alibi was to deceive them, that can provide support for identification.
- [31] Secondly. An accused's failure to testify must not be viewed as capable of supporting the evidence against him. Hence the exercise of the accused's right to silence do not in itself constitute evidence of guilt and should not be seen as a substitute for satisfactory identification evidence. The burden of proof remains entirely on the prosecution to prove the offences against the accused persons beyond reasonable doubt.
- [32] The other evidence adduced established that the accused persons and the complainant/victim and the prosecution witnesses Ted Nanon, Christopher Nanon, Ronny Quatre were in close proximity during the quarrel near a floodlit basketball court for a lengthy period of 1 to 1 ½ hour before the accused persons left the scene. The description of the clothes worn by each accused and the size and built of each accused were consistent and uncontradicted. Threats of violence and offensive language were mutually exchanged between the accused persons and the victim and his entourage and no other person or group of person. There were hundreds of persons at the event but only the victim, his entourage and vehicle were targeted for the attack a reasonably short time

after the first confrontation. The perpetrators targeted the offending vehicle which had earlier blocked that vehicle and its occupants with whom they had quarrelled.

[33] Having considered such evidence I now consider the evidence adduced in defence. Both accused persons admitted in their under-caution statements the first incident between themselves and the victim and his entourage but denied having ever returned to the scene to commit the offences with which they have been charged. The 1st accused maintained the same in his dock statement.

[34] The witnesses for the defence however were not consistent in their testimonies. These include contradictions on the number of persons in the company of the accused persons. According to Barry Kilindo, in the car with him were the 1st accused who was driving, the 2nd Accused, the girlfriend of the 1st Accused and an infant child of the 1st Accused. No mention is made of Patrick Labrosse. He also stated that they arrived at Beau Vallon at around 6pm and left at around 9 to 10pm which is the approximate time agreed to by the defence witnesses. It must be noted that according to the evidence adduced by the prosecution the incident occurred between 9:45pm and 10pm. There is also the issue of whether the infant was sleeping or running around.

[35] Having considered the evidence adduced and the demeanour of the witnesses, I am satisfied that having maintained a confrontation for approximately 2 hours or more under a floodlit patch of ground, there is ample opportunity and time for the persons involved to examine and identify each other closely albeit not come to know their names. I find that the attack on the victim/complainant took place near the floodlit court where there was ample lighting. I find that the victim fell on his back and was able to see the 1st Accused clearly whilst fending off blows from the machete wielded by the 1st Accused. The evidence of the three other prosecution witnesses are consistent in that respect. The identification of the 2nd Accused is also beyond doubt considering that the witnesses Christopher Nanon and Ted Nanon could not only see his face but managed to evade some slingshots being directed at them. Both the 1st and 2nd Accused approached the vehicle to within an arm's length to inflict damage with a machete and slingshots whilst the witnesses has sought refuge inside. Secondly, even from the defence evidence one

witness Patrick Labrosse, placed the accused persons still at Beau Vallon at 9:45pm to 10pm, the time of the commission of the offence.

- [36] I do not accept the evidence of the 1st Accused and defence witnesses that they left Beau Vallon immediately after the 1st confrontation. I find the evidence in support of the accused persons alibi to be weak and not at all credible. I reject the same evidence entirely.
- [37] On the other hand, keeping in mind the principles governing identification as set out above, I am satisfied that there was no mistake in the identification of the 1st and 2nd Accused considering the extremely lengthy time they were in close proximity and eying and insulting one another near a floodlit court. On that aspect I accept the evidence of the witnesses for the prosecution in their entirety.
- [38] In respect of the evidence of injuries to the victim/complainant and damages to vehicle S9579, in view of evidence adduced in that respect were not challenged or contradicted, I also accept the prosecution's evidence in their entirety.
- [39] I also find that the 1st and 2nd Accuseds acted in concert hence satisfying the requirement of section 23 of the Penal Code.
- [40] Consequently I find that the prosecution has proved beyond reasonable doubt both counts against the 1st and 2nd Accuseds. I find both Accuseds guilty as charges and I convict both accused accordingly on both counts.

Signed, dated and delivered at Ile du Port on 18 January 2018

G Dodin
Judge of the Supreme Court