

**IN THE SUPREME COURT OF SEYCHELLES**

**CriminalSide: CO45/2017**

[2018] SCSC 739

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**THE REPUBLIC**

versus

**FREDDY ESPARON**

Accused

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Heard: 26<sup>th</sup> February 2018  
Counsel: Mr Georges Tachett, Assistant Principal State Counsel for the Republic  
Mr Nichol Gabriel for the accused  
Delivered: 1 July 2018

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**JUDGMENT**

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**R. Govinden, J**

- [1] The accused, Freddy Esparon, is charged with two counts of the Offences of Robbery with violence contrary to section 281 as read with section 280 of the Penal Code (CAP 158) punishable under section 281 of the Penal Code.
- [2] In the first count, the particulars of offence averred that "*Freddy Esparon*, alias, "major," a 30 year old casual labour of Les Mamelles, Mahe, at around 1900hrs on the 1<sup>st</sup> of September 2017, at the Les Mamelles Bus Stop, armed with a dagger, held it at the throat

and threatened to use it against one Mohammed Goolam, and stole from him a phone, cash and jewellery amounting to an approximate total value of SCR56, 635”.

[3] In the second count the particulars of offence averred that “*Freddy Esparon*, alias “major”. A 30 year old casual labourer of les Mamelles, Mahe, at around 1900hrs on the 1<sup>st</sup> of September 2017, at Les Mamelles Bus Stop, armed with a dagger threatened to use it against one Danio Bristol and stole from him jewellery , amounting to an approximate total value of SCR 2000.”

[4] Both counts are charged consecutively. The time and place for the commission of the two offences are the same, except that the alleged victims and the total value and nature of the items alleged to have been robbed from the victims are different in the two counts

[5] In support of these charges the prosecution chose to call five witnesses, including the virtual complainants, Mohamed Goolam and Danio Bristol.

[6] As far as the defence is concerned, the accused chose to remain silent and not to call any witnesses in his defence.

[7] Burden of Proof

[8] In accordance with article 19(2) (a) of the Constitution of Seychelles the accused is innocent until he is proved or has pleaded guilty. The accused has no duty to prove himself innocent in this case.

[9] Standard of Proof

[10] The standard of proof in criminal matters is proof beyond a reasonable doubt. If there is any reasonable doubt in the evidence, such doubt must be resolved in favour of the accused person. An accused person can only be convicted if the evidence adduced against him, taken as a whole, shows that there is no reasonable doubt. Mere suspicion, however strong it might be, is not evidence and hence cannot be relied upon by the court to convict.

[11] If an accused remain silent and does not adduce evidence, but evidence points to a possible defence, the prosecution must disprove the defence beyond a reasonable doubt. *Vide, Dodin v/s Republic, SCA 06/2003.*

[12] Elements of the Offences

[13] Section 280 of the Penal Code defines Robbery as follows, inter alia, “*Any person who steals anything and at or immediately after the time of stealing uses or threatens to use violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to it being stolen or retained.*”

[14] Section 281 on the other hand set out the circumstances that makes the Robbery an aggravated one. These circumstances includes the offender being armed with any dangerous or offensive weapon or instrument or is in the company with one or more other persons or where violence is used against the victim .

[15] In the event that violence is proven, the convict is liable to be sentenced to life imprisonment.

[16] The elements to be proven beyond a reasonable doubt in order to prove a case of Robbery with Violence are!:-

- (a) There must be an act of theft
- (b) The theft must be accompanied by violence either during, before or after the theft or the accused must be armed.
- (c) The accused must be the person who committed the Robbery.

*Vide, R v/s Allan Ah Kong C/R 69 /04*

(a) The act of theft

Theft is an act of dishonestly appropriating property belonging to another with the intention of permanently depriving the person of it.

- [17] In this case as part of the constitutive elements of the offence in count (1), the prosecution has charged the accused of stealing from one Mohammed Goolam, a phone, cash and jewellery amounting to an approximate value of SCR 56, 635 .As part of the constitutive elements of the offence in count (2) the prosecution has charged the accused of stealing from Danio Bristol jewellery amounting to SCR 2000 in value.
- [18] The prosecution bears, therefore, the burden of proving beyond a reasonable doubt that the accused dishonestly appropriated the properties of Mr Mohamed Goolam and Mr Danio Bristol with the intention of permanently depriving this person of those properties.
- [19] The court would have to examine the facts and circumstances involved in and related to the acts of dishonest appropriations of the different properties and see whether the acts of theft is proven.
- [20] Mohamed Goolam testified that on the 1<sup>st</sup> of September 2017 he was at a Bus Stop at around 7 pm in the evening together with some other boys, whilst he was on the phone he felt somebody grabbed his necklace and this person,who he later recognized as the accused, was standing in front of his person and he put a knife under his neck. The attacker then forcefully took from this person his phone and asked him to surrender all his personal belongings. Mr Goolam removed his ring and bracelet and money in his pocket and gave it to the accused whilst under threat. Thereafter, the accused ran away and he was chased by the boys, including Mr Goolam and identified as the accused. According to this witness all in all the accused forcefully took a bracelet; two necklaces; one pendant and three rings .Mr Goolam was shown a police photograph, exhibit P(1), showing the stolen items and he managed to identify his properties stolen by the accused; except that one ring was missing from the photograph.
- [21] In the case of Danio Bristol. He testified about an act of theft. He said that he was sitting under the Bus Stop and then he left. When he was going away he bumped into the accused who he knew as “major”. The accused asked him of the whereabouts of Mohamed. Danio replied that Mohamed was under the Bus Stop. Thereafter, Danio went back to the same bus stop. There he sat under the Bus Stop with some other friends

including Mohamed, after a while a person who he later recognized as the accused came and stood in front of them and threatened them with a knife and told them to give him their belongings. According to Danio, from him the accused took a phone and two silver necklaces.

[22] In relation to both incidents I find that the accused who was identified by both Mohamed Goolam and Danio Bristol, did dishonesty, misappropriated the properties of Mohamed Goolam and Danio Bristol as averred in the charge, with the intention of permanently denying these persons of their belongings.

[23] The fact that the accused used force and threatened both complainants with a knife and the fact that they unwillingly handed over the properties to the accused under threat and coercion prove the dishonest misappropriation. It is also proven beyond a reasonable doubt that the accused had the intention of permanently depriving both Mohamed Goolam and Danio Bristol of their belongings. This is because he ran away upon committing the act of theft and he was chased after by both boys.

[24] Moreover, the accused thereafter went to sell the properties that he had stolen to a third party. The accused was arrested on Sunday the 1<sup>st</sup> of September 2017 by the police. He was informed of his constitutional rights. He then cooperated with the police and assisted them to retrieve the stolen items. He informed the police that he had sold the properties that he stole from Mohamed Goolam and Danio Bristol to one Therese Delcy. The latter testified and that on the 1<sup>st</sup> of September 2017 whilst she was at her home the accused came to her house and sold her one bracelet; two rings; a necklace and a phone for Rs 4000. The police had produced in evidence through witness SI Stepanie Agathe a photograph, namely exhibit P(1), that was taken of the properties soon after they were given to the Police Ms Therese Delcy. The items in P(1) were identified by witness Mohamed Goolam as being the ones stolen from him by the accused.

[25] I find that the act of selling the stolen properties to Therese Delcy by the accused shows that he had the intention of permanently depriving Mohamed Goolam of those properties.

Accordingly I find that this element of theft of the properties proven beyond a reasonable doubt.

(b) The theft must be accompanied by violence or threat of violence either during, before or after the theft or that the accused was armed with a dangerous or offensive weapon or instrument.

[26] In this particular case, under both counts, the prosecution has averred that the accused was armed with a dagger which he used to threaten Mr Goolam and Mr Bristol.

[27] Mr Mohamed Goolam testified that on the 1<sup>st</sup> of September 2017, he was on the phone and then suddenly he felt the accused grabbed his necklace then the accused put a knife under his neck. After that the accused took his phone; his ring; bracelet and money. I am satisfied beyond a reasonable doubt that the accused was armed with a knife and that he used personal violence upon Mr Goolam in order to misappropriate the latter's properties. I therefore find that that the element of violence under count (1) proven beyond a reasonable doubt.

[28] Mr Danio Bristol, on the other hand testified that on the 1<sup>st</sup> of September 2017 he was under the Bus Stop at Les Mamelles and suddenly he saw the accused came and threatened him and Mohamed Goolam with a dagger and asked them to give their phones; necklaces and chains. He took the phones and chains from them. According to Mr Bristol he was compelled to give up his jewellery to the accused whilst under threat. I therefore find that the element of violence under count (2) proven beyond a reasonable doubt.

(c) The accused must be the person who committed the robbery (identification)

[29] The prosecution bears the burden of proving beyond a reasonable doubt that it was the accused who committed the offence in the charges.

- [30] I find that there are issues regarding the presence of the accused on the scene of the offences in this case. The accused is denying the offence and at any rate says that the two identification witnesses could not have identified the person who robbed them as according to evidence the person's face was hidden; the sighting of the person was brief and it was dark.
- [31] In the case of R vs Turnbull (1976) 63 Cr. App R 132. It was held "*In our judgment when the quality is good as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative; neighbor, a close friend; a workmate; the situation is different. The judge should withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification*"
- [32] On the other hand in R v Bentley 1991 CLR 620 the court held "*A recognition, which was the type of identification here could not be regarded as trouble free because many people had expressed seeing someone on the street that they knew and later discovered that they were wrong*"
- [33] Further in the case of R vs Doldur [1999] ALLER1223 the court of Appeal held that no parades were necessary if a witness purported to identify a distinguishing feature such as clothing on the offender.
- [34] I also note Philipson on Evidence (12<sup>th</sup> edition) para 381 under sub heading "*Personal Characteristics*", which state that "*Where a party's identity is in issue, it may be proved or disproved not only by direct testimony or opinion evidence, but presumptively by similarity or dissimilarity of personal characteristics eg age, height, size, hair, dress distinctive marks, features, as well as of residence, family relationship, education, travel, religion, knowledge of particular people, places or facts and other details of ..... history*"

- [35] At paragraph 400, Philipson further states as follows:- *“Incriminating material found on an accused person possession may be admissible if it tends to identify him and they negative mistaken identification by prosecution witnesses. This Rule applies where identification is in issue although there is no proof that the property or instruments were used in the crime charged, provided there is some features in the case which makes them relevant to the question of identification”*.
- [36] I bear in mind the above authorities in considering the issues regarding the identification of the accused in this case. First of all I warn myself in terms of the *“Turnbull Warning”*. I find that that both Brian Bristol and Mohamed Goolam testified that they saw the accused momentarily and with fleeting glances. Mohamed testified that he saw the accused face when he ran away from the Bus Stop and the accused looked back and he could see his face, notwithstanding that he had attempted to wrap a piece of cloth around his face .
- [37] Mr Bristol on the other hand has testified that there was a white boxer around the face of the accused and when he ran away from the Bus Stop, after having robbed him, the boxer fell down and he could see the face of the accused.
- [38] The facts shows that the robbery occurred with in a very short space of time. It was 7 pm at night. The accused face was covered. It was only when he looked back after he was chased that both Mohamed and Danio saw his face and that would have been for a few seconds.
- [39] I warn myself that where a case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken the judge should warn the jury of these special needs for cautions before convicting accused on relying on the correctness of the identification. I warn myself that a caution is required to avoid injustice; a witness who is honest may be wrong even if they are convince they were right; a witness who is convincing may still be wrong.



- [40] I have examined the circumstances in which the identification by each witness was made. I have examined the length of time the accused was observed by the witnesses; the distance that the witnesses were from the accused and the state of the lighting conditions at the time that the accused was identified.
- [41] The accused person was recognised by the two complainants . Both of them testified that they are acquainted to the accused person; they had met him several time before, as he frequents their vicinity. They both know him by his nickname “major” and they noticed his tattoos; his gait; his clothing and his physical built. Moreover, according to Danio, he had seen the accused shortly before the incident whilst he was away from the Bus Stop and that the accused had asked about the whereabouts of Mohamed.
- [42] I further warn myself that it is commonly accepted that recognition is more reliable than identification of a stranger; however even when the witness appears to recognize someone he knows; I remind myself that mistakes in recognition of close relatives and friends are sometimes made.
- [43] Having so caution myself in terms of the above guidelines, I am of the view that both Danio Bristol and Mohamed Goolam has been able to identified the accused on the scene of the Robbery. Both of them were familiar with the accused person. They recognized him as being their assailants. This recognition was done under circumstances and in conditions that allow them to properly see the accused. Both of the witnesses saw the face of the accused person; they were familiar with his face; voice gait and physical appearance.
- [44] I note that Moahamed and Danio has also carried out a dock identification of the accused in this case. Both witnesses positively identified the accused in court. I find that such Dock Identification though admissible carry little and sometimes no evidential weight at all. In this case, however, there is an abundance of identification evidence of the accused at the scene of the commission of the offences by Mohamed Goolam and Danio Bristol in the form of recognition. The dock identification therefore comes as a second form of identification. This is not a case in which the identification witnesses are identifying the accused for the first time in court, with all the evidential limitations that this exercise will

maintain. This is a case in which those witnesses have already identified the accused outside the court and is only confirming that identification. I therefore rely upon Identification it confirm by recognition.

[45] Possession of the stolen items by the accused can be a form of identification. In this case the accused was seen in possession of the stolen items by witness Therese Delcy soon after the commission of the offence. These items were sold to this witness by the accused himself. The items have been positively identified by Mohamed as being those that were forcibly taken from him by the accused. I therefore find the possession of the stolen items by the accused as circumstantial evidence showing that it was him who committed the offence.

[46] Accordingly, I find beyond a reasonable doubt that it was the accused and no other persons that has committed the acts averred in count (1) and count (2) of the charges before the court.

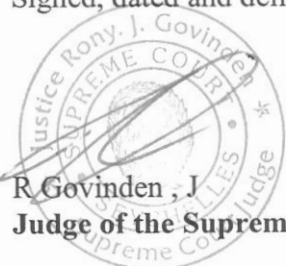
(d) Accomplice evidence

[47] An accomplice is a person who has helped the principal in some way or another in the commission of an offence. They can be accessory before or after the fact. I find that in this case Therese Delcy is an accomplice after the fact. She obtained and received the stolen items from the accused in circumstances in which she should have known that they were stolen. She was treated as such by the police and was arrested and remanded. Though she is not charged by the prosecution in this case.

[48] In the case of Dominique Dugasse and others vs Republic SCA25; 26 and 30 of 2010 the court held that “*We therefore hold that it is not obligatory on the courts to give corroboration warning in cases involving accomplice evidence and we leave it at the discretion of judges to look for corroboration when there is an evidential basis for it*”. A statement of law reiterated in the case of Jean Francois Adrienne and ors vs Republic SCA 25 and 26 of 2015.

- [49] In this particular case I find that Mrs Delcy to be an accessory after the fact. I hence treat her evidence with caution. I find, however, that she does not have a reason or motive to adversely implicate the accused in the commission of the offences charged and that there is no evidential basis to look for corroboration. However, at any rate I find that the evidence of Mrs Delcy to be corroborated independently and in a material particular by the evidence of Mohamed who identified the items that Mrs Delcy said she received from the accused to be those stolen by the accused from his person.
- [50] I further find no reason to doubt the veracity of the witnesses who testified before the court and I conclude that the few contradictions are on account of human errors. I therefore accept that the said witnesses gave truthful evidence and I rely on those evidence.
- [51] I therefore find that the charges of committing Robbery with violence contrary to section 280 as read with section 281 of the Penal Code, as charged in the first and second count proven beyond a reasonable doubt by the prosecution.
- [52] I hence, find the accused guilty of both charges and convict him accordingly.

Signed, dated and delivered at Ile du Port on 1 July 2018

The seal of the Supreme Court of Seychelles is circular. It features a central emblem with a scale of justice and a book. The text "SUPREME COURT" is written in a circle around the emblem. The name "Justice Rony. J. Govinden" is written around the top inner edge of the seal, and "Judge" is written at the bottom inner edge. There is a small star on the right side of the seal.  
**R. Govinden, J**  
**Judge of the Supreme Court**