

IN THE SUPREME COURT OF SEYCHELLES

CriminalSide: CO43 /2017

[2018] SCSC 860

THE REPUBLIC

versus

CARLOS JUMAYE
Accused

Heard: 28-03-18, 23-04-18, 29-05-18 and 11-06-18
Counsel: Mr. K. Karunakaran , State Counsel for the Republic
Mr. N. Gabrielfor the accused
Delivered: 30 August 2018

JUDGMENT

Vidot J

The Charge

[1] The Accused is charged as follows;

Statement of Offence

Robbery with violence contrary to Section 281, read with Section 280 of the Penal Code (Cap 158) and punishable under the same

Particulars of Offence

Carlos Jumaye, a 19 year old of Pointe Larue, Mahe, around 1900 hours on 21st August 2017, at Ex-Albert Estate, armed with a piece of wood, hit one Louisette Sinon on her shoulder causing her significant injury and slapped her, and after struggling with her, robbed her of her handbag containing money and items of an approximate value of SR 19,750/-.

The Prosecution's Case

- [2] The Prosecution called several witnesses and the main witness was the alleged victim, Louisette Sinon (hereafter "Louisette").
- [3] Louisette testified that she lives at the Ex-Albert Estate, Anse Dejeuner. She knows Carlos who he is often in the area as he frequents his grandmother's home in the same area. She knows the grandmother well. On 21st August 2017, whilst returning home on foot, she noticed Carlos with a stick not far from his grandmother's home. While she continued on her way she noticed that Carlos following behind her. At some point he overtook her and as he passed by and greeted her "good evening". Thereafter, further up the road, Carlos approached her with the stick. She told him that he was doing was wrong. Carlos just asked for her bag and she refused to give it to him. So, Carlos tried to strike her with the stick but she blocked it but was hit on the shoulder. He continued to strike her with the stick and she tried to fight back at which point Carlos bit her hand. They fell to the ground and struggled and after they got back up he kept insisting that she hands over the bag. She was screaming and he pulled away the bag and ran off.
- [4] Louisette was still screaming; "Carlos has taken my bag" when two persons approached her. She had SR12,500/-, €80, \$200 and other items in her bag. The persons who approached her called the police. The next day she reported to the Doctor.
- [5] Nelson Samson, (hereafter "Nelson"), a PSSW officer testified that on 21st August 2017, after finishing work at 4pm, he had gone to his girlfriend's at the Ex-Albert Estate. His girlfriend is Anette Rose (hereafter "Annette"). On the way up he had noticed a young man who appeared "excited". He noticed that there was something weird with the boy. He did not know him but his girlfriend had noted that she knew him. Going uphill he

heard a scream; “help me, help me”. He stopped the car, disembarked and proceeded towards the scream where he found a lady on the ground. The lady stated that Carlos had attacked her with a stick. His girlfriend who had remained in the car thereafter joined him. The lady jumped in his girlfriend’s arms and was crying and repeated that Carlos had attacked her and stolen her things. He proceeded to call the Police for assistance.

[6] Nelson’s evidence is largely corroborated by the testimony of Annette.

The Defence Case

[7] The Accused’s defence is one of mistaken identity. It is not denied that he was in the vicinity at the material time and date, but that he did not commit any offence against Louise. The defence did not call any witnesses on its behalf. He exercised his right to remain silent and no adverse ^{inference} shall be drawn from that.

Right to Fair hearing

[8] Article 19 (1) of the Constitution provides that “*a person charged with an offence has the right, unless the charge is withdrawn, to a fair hearing within a reasonable time by an independent and impartial court established by law.*” Article 19(2)(d) guarantees an accused’s right to legal representation, which can be at his own expense and choice or through the legal aid scheme, whilst sub-article (2)(e) of that Article safeguards an accused right to examine witnesses called by the prosecution and to obtain the attendance and carry out the examination of witnesses to testify on his behalf.

[9] From the very outset of this case, the Accused was made aware of this. In **Florentine v R SCA 1/1998 LC 138**, it was held that the essential corollary of the right to legal representation is that the accused should be made aware of that right.

[10] The Accused initially elected to have legal representation of his own choosing. In fact he came to Court with Mr. C. Andre. Thereafter he decided to apply for legal aid and an Attorney, namely Ms. K. Domingue, was assigned to him. It appears from ~~that~~ counsel’s ^{that} that despite her best endeavours, the Accused failed to keep appointments with her office to discuss the best course of defence. Due to this lethargic non-interest with his case, the

Attorney sought leave to withdraw from the case, which application was granted and the case proceeded in the absence of a lawyer. Despite that, in ensuring the Accused's right to fair trial, the Court assisted the Accused as best it could as far as the law would permit, in the conduct of his defence. He was given opportunity to cross examine witnesses and when it was felt that there were pertinent issue to be resolved, the Court put questions to the witnesses and advised the accused as to procedural and substantive law. Later in the case, the Accused retained Mr. N.Gabriel to represent him.

[11] The right to legal representation as guaranteed under the Constitution, is not an absolute right. A litigant cannot decide to sit on his right and stall all legal process. This will be an abuse of such right and a perversion of the course of justice that the court cannot condone. I am satisfied that in the present case, this Court adopted all reasonable steps to ensure the exercise of that right by the Accused and when that failed, it ensured that the Accused was assisted and had the opportunity to cross examine witnesses. The Accused was also granted the right to call witnesses. The case had to be adjourned on one occasion because the Accused had indicated that his witness was absent. However, when the witness on a subsequent date failed to attend, the Court refused to grant any further adjournment.

Undisputed and Established facts

[12] Having heard the witnesses and given due consideration to all the evidence, I find the following facts established, particularly since they were not disputed or traversed in any way whatsoever;

1. On 21st August 2017, Louisette was attacked at Ex-Albert Estate whilst she was on her way to home;
2. The person who attacked her was male and armed with a stick;
3. The attacker used the stick to hit Louisette and as result she suffered injuries, namely abrasions and contusions to the face and left shoulder and multiple traumatic injuries as per medical report (Exhibit P1);

4. Upon being attacked, Louisette screamed and that she received assistance from Nelson and his girlfriend, Annette;
5. Nelson found Louisette on the ground crying and was complaining of having been attacked and naming the person she believed attacked her;
6. Nelson and his girlfriend assisted Louisette and the former called the Police for assistance. The Police assisted Louisette and she elected to visit the doctor on the subsequent day, which she did and as a result thereof, Exhibit P1 was prepared.
7. The person who attacked Louisette stole~~n~~ from the items identified above.
8. Louisette's bag and purse were discovered the next day.

Elements of the Offence

[13] In order for the to establish the offence the Prosecution has prove beyond reasonable doubt that (i) there was a theft and (ii) that at or immediately before or immediately after the time of stealing, use or threats used actual violence against any person or property in order to obtain or retain the thing stolen or prevent or overcome resistance to its being stolen or retained.

[14] Following from the established facts as identified under paragraph 12 above, I am satisfied that the Prosecution has established the offence. The evidence of Louisette, Nelson and Annette and supported by Exhibit P1, leave no doubt in my mind that the incident happened; namely that Louisette was attacked with a stick, that there was a struggle with her assailant and that the later stole the items aforementioned from her. However, what is required now is to satisfy court that the Accused was the perpetrator of that crime. He disputes identification.

Identification

[15] In assessing evidence of identification, I bear in mind that miscarriage of justice can be occasioned by mistaken identity; see **R v Slater [1959] 1 Cr. App. R 578**. That case held that where there is possibility of mistaken identity, the jury should be directed to deal with possibility of mistaken identification cautiously. In the Leading case of **R v Turnbull [1976] 3 WLR 555**, it was held that a warning of the danger of relying on uncorroborated evidence in cases of disputed identification evidence, particularly cases of fleeting glances, should be administered; vide **R Oakwell 66 Cr.App. R 191 CA**. The general rule is that when identification is in doubt, the court should remain cautious in dealing with uncorroborated evidence.. Indeed, in **Turnbull** (supra) it was held that the general rule is that when identification is in doubt, it is for the judge to administer a Turnbull. I remind myself of such a warning in this case. However, **R v Oakwell** (supra) held that a warning is not necessary in every case of minor identification problems; see **R v Curry and Keeble [1983] Crim. L.R 734 CA**.

[16] Cross on Evidence 10th Edition, citing **People (AG) v Casey (No. 2) [1963] IR 33**, [1385] remarked that court has always adiscretion to warn the jury of danger of convicting without corroboration in cases involving the identity of the accused by recognition of his physical appearance. In **Arthurs v AG (Nothorn Ireland) [1970] 55 Cr. App. R 161 HL**, it was held that no special warning needed to be given where the witnesses and accused were previously acquainted to each other. But as is provided in Cross (supra) (p79) the “*court always has the discretion to warn the jury of the dangers of convicting without corroboration in cases involving the identification of the accused by recognition or physical appearance.*”

Evaluation of Evidence and Law

[17] In this case, there is identification and recognition. First Neslon testified that he had seen the Accused whilst going up with his Annette, he had noticed the Accused who seemed excited. His girlfriend had indicated that she knew Carlos. After assisting Louissette who he found on the ground he had noticed the Accused running away downhill. He said he could identify the Accused because of the clothes he was wearing. His testimony is however unreliable in that respect as ~~he stated~~ that testified that he noticed the Accused, a

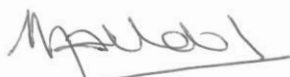
person he had not known before, apart from seeing him sometime prior to the incident, running away some 700 meters away. At that time it was past 6.30 pm. It was dusk and therefore unlikely that at that distance that the clothing would be clearly visible, despite asserting that there was street light. This evidence is unsafe and cannot be relied upon; see **Freddy Oreddy v Republic SCA Cr 03/2011**.

[18] Louissette on the other hand testified that she recognised the Accused as the person who attacked, assaulted and stole from her. She had seen him when she was going up. The Accused is a person known to her, whom he had seen at Ex-Albert Estate often and on that material day had noticed him at his grandmother's house. She stated that she knows the Accused very well. Actually, Carlos had greeted her whilst she was going up. He comes to his grandmother's house and she adds; "I know his grandmother and his grandmother is in the church". She had observed the Accused following her and overtaking her before launching the assault. The Accused had hidden his face with shirt but during the struggle she had removed the shirt and exposed his face.

[19] In **Jose Nessesse v The Republic SCA 35 of 13**, citing **Fawden [1982] Crim. LR 588** and **Kajala v Noble [1982] 75Cr. App. R 149**, it was noted that "*where a witness knows a defendant sufficiently, he can give evidence of this.*" I remind myself nonetheless that as per the guideline in *Turnbull* (supra) "*recognition may be more reliable than identification of a stranger; but even when witnesses purporting to recognize someone he knows, the jury should be reminded that mistakes in recognition of relatives and friends are sometimes made*"; vide **Republic v Allen Ah-Kong SCSC 69 of 2004**. I warn myself of the same because a *Turnbull* warning direction is generally required where identification is a substantial issue; vide **Beckford v R 97 Cr. App. R. 409**. I shall not in considering the case give particular credence to the dock identification, but rely on prior identification by way of recognition at the scene of incident. However, I do find the evidence of Louissette credible and not challenged in any material way. I have no reasonable doubt that Louissette was able to reliably identify the Accused as the perpetrator of the crime against her.

[20] Therefore, I find the Accused guilty of the offence as charged and proceed to accordingly convict him of the same.

Signed, dated and delivered at Ile du Port on 30 August 2018

A handwritten signature in black ink, appearing to read 'M Vidot', written over a horizontal line.

M Vidot

Judge of the Supreme Court