

IN THE SUPREME COURT OF SEYCHELLES

The Republic

vs

France Panagary

of Point Larue, Mahé

Defendant

Criminal Case No: 61 of 2008

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Mr. R. Durup for the Republic

Mr. F. Bonte for the Defendant

D. Karunakaran, J

JUDGMENT

The defendant France Panagary stands charged before the Court - under **Count 1-** with the offence of "*Robbery with violence*" contrary to Section 280 and punishable under Section 281 of the Penal Code AND under **Count 2** with the offence of "*Breaking into Building*" to commit a felony therein contrary to and punishable under Section 291(a) of the Penal Code.

The particulars of the charge under **Count 1** state that the defendant of Point Larue, Mahé along with another person unknown to the prosecution, on 6th July

2008, at Point Larue Petrol Station, Mahé stole SR 4,500/- and immediately before the time of stealing threatened to use actual violence on the workers of the said Petrol Station in order to obtain the said sum SR 4,500/-

Whereas the particulars of the charge under **Count 2** state that the defendants along with another person unknown to the prosecution, on 6th July 2008, at Point Larue, Mahé broke and entered the shop of the Point Larue Petrol Station and committed a felony therein namely, stealing the sum of SR 4,500/-

The defendant denied the charges. The case proceeded for trial. Mr. Bonte, an able and efficient defence Counsel duly defended him throughout the trial. The prosecution adduced evidence by calling six witnesses to prove the guilt against the defendant. After the close of the case for the prosecution and upon taking a cursory look at the evidence, it appeared to the Court that there was sufficient evidence on record relying on which any reasonable tribunal might base a conviction against the defendant for the offences he stands charged with. Hence, the Court ruled that he had a case to answer in defence. He was accordingly, put on his election in terms of Section 184 (1) of the Criminal Procedure Code. The defendant elected to give evidence on oath and also called two witnesses for the defence namely, his wife and one of his neighbours to establish the defence of *alibi* coupled with *misidentification*. Incidentally, I wish to observe herein that every person charged with an offence, and the wife or husband, as the case may be, of that person so charged, shall be a competent witness for the defence at

every stage of the proceedings *vides Section 134 of the Criminal Procedure Code*. However, the wife or husband shall not be a competent witness for the prosecution subject to certain exceptions – in terms of *Section 132 of the CPC*. Obviously, the expression used in this section namely, “shall not be competent” implies that such witness “shall not be compellable” as it is a cardinal principle of common law that a wife or husband is not to be compelled to give evidence against the other spouse in any proceeding - for obvious reasons aimed at protecting the institution of marriage and the family, the fundamental unit of the society. Having so observed, I will now move on to rehearse the facts of the case in this matter.

The material facts that transpire from the evidence are these:-

The defendant is a taxi driver by profession. He is a resident of Point Larue, Mahé. He is married and has a family. He is living with his wife one Hazel Panagary - DW3 - and his son Emmanuel, aged 4, in a two bedroom house at Point Larue. There is a car park in the front yard; a kitchen and a living room in the front portion of the house facing the front yard. According to the defendant, although there is no wall separating the kitchen from the living room, they are separated by different ground levels. There is a dining table in the kitchen; a sofa set and a television in the living room. The defendant has an amiable next-door neighbour by name Jenita Telemaque (DW2). She is living with her family in an adjacent house close to that of the defendant. As neighbours, both families are

friendly and helpful to each other. Be that as it may.

There is a Petrol Filling Station at Point Larue on the mountainside of the Point Larue main road - opposite the Seychelles International Airport - situated at a distance of about ten minutes-drive from the defendant's house. Front part of the station is the filling area with vehicular access to petrol pumps, whereas few yards behind is the shop-unit, a room partly made of glass-panelled windows and glass doors. One Mr. Paul Latullipe - PW2 - is the manager of that Petrol Station. He lives at Au Cap. He has a brother by name Elvis Latullipe - PW3, who usually goes to the Petrol Station in the evenings, in order to assist his brother in closing the station. The petrol Station is being run by three workers namely, Mrs. Sultana Zialor (PW4), Mrs. Giovanna Bristol (PW5), who is none else than the mother of PW4 and Mrs. Ellenate Agricole (PW6), who is none else than the aunty of PW4. As far as Mrs. Sultana Zialor (PW4) is concerned, she has been working there as pump attendant for the past six years. According to her, she knew the defendant very well. She knew the defendant as a taxi-driver and also knew him by name, even before she started employment at the Petrol Station. Before joining the Petrol station, she had been working in a burger-stall at the taxi-stand. The defendant being a taxi-driver, she knew him as such as he had been seen often at the taxi-stand. In fact, she stated that she had known him even before she started working with that burger-stall. Although all three were employed as pump assistants, they are also in charge of the shop and accountable for the cash collected from the daily sales of the petrol and other products. Generally, they

close the station and the business, daily in the evening at around 8 p.m. Then they all stay for about half-an-hour inside the shop-unit in order to complete the accounting of the daily sales and to count the cash received from the sales of that day.

On the 6th July 2008, in the night at around 8. 15 p. m, undisputedly, an incident of robbery took place in the shop-unit of the said Petrol Station. The manager Mr. Paul Latullipe was not present that time. He had gone home leaving the responsibility of closing the station to his three workers mentioned supra. As usual at around 8 p. m, all the workers closed the station. They went into the shop-unit, closed the glass door and locked it from inside. They started doing the accounting for the daily sales and were counting the cash. While they were working inside, they were shocked by a sudden noise of glass being smashed coupled with an immediate scene of violence. Two men suddenly emerged outside, came closer to the shop-unit, broke the glass panel and smashed the window to gain access. After smashing the window, one of them stayed back watching outside, whereas the other intruder rushed forcefully with a machete - a long knife - in his hand and gained entry into the shop through the smashed glass window. All three workers inside were horror-struck and shocked by the incident. They were so frightened and did not know what to do except screaming. Among the three workers, the mother (PW5) and the aunty (PW6) of Mrs. Zialor (PW4) were so terrified they could not even muster courage to face the intruder. However, Mrs. Zialor could see the face of the intruder. The tube light inside was

commanding in that surrounding. Mrs. Zialor testified that the man who entered the shop at the material time with a machete in his hand was undoubtedly, France Panagary, the defendant, who now stands charged before this court in this matter. According to Mrs. Zialor, the defendant having thus gained entry into the shop shouted "Give me all the money". All three women workers in no minute told him to take all the money from the drawer, showing the place where they had kept the money, namely the sale proceeds of the day amounting to approximately SR4,500/- The defendant took all the cash from that drawer and again brandished the knife and asked them if that was all. They all said "yes". Then the defendant went out with the cash and his machete through the same passage of his entry and disappeared. Although Mrs. Zialor (PW4) could recognise the intruder inside as defendant, neither she nor any other worker could recognise the man, who stayed behind watching outside.

Mr. Elvis Latullipe - PW3 - the manager's brother had also been in the premises of the petrol station at the time of robbery. He could only witness part of the scene but could not do much to prevent the intruders from committing the crime. He testified that on that particular night at around 8. 20 p. m he went in his car to the Petrol Station as usual to assist the workers in closing the station. In fact, he was close to the scene of occurrence. The evidence of this witness in this respect runs thus:

"When I arrived there I parked my car under canopy. The pump operators were already inside the small shop and the door was closed locked. Usually what I do,

I unlock the other show room and I go inside and do some things. But on that day, I did not do that because I had to fill a bottle of water. So, I got the bottle from my car and went to the tap, which is approximately 25 meters from the small shop, where the girls were. Whilst filling the bottle I heard some screams and sounds of shattering glass. I ran towards the small shop, where the girls were and that is when I saw two men breaking the glass window. I shouted at them and one stood up and came towards me with a machete and the other one managed to get inside. I had the bottle of water with me. I threatened to throw it at the person but he still came towards me with the machete. What I did, I walked backwards still facing that person threatening to throw the bottle. Then that guy who came towards me had piece of glass in his hand, which he threw at me. It passed over my head, at about 2 feet above my head.. At that time the other person also came from inside and both came towards me, and that when I ran towards the main road and started shouting for help... both ran towards town direction.”

The manager Mr. Paul Latullipe - PW2- also testified for the prosecution. He stated in essence, that he arrived at the scene immediately after the occurrence of the robbery and noticed the smashed windows and the broken glass-pieces scattered around and inside the shop, where the workers used to do the accounts. The incident was immediately, reported to the police. The police started investigation. The following morning at around 7 a. m on the 7th July 2008, Sub-Inspector James Tirant - PW1 - from the Scientific Support and Crime

Report Bureau visited the scene of crime. He took four photographs of the scene and they were all produced in evidence. These photographs showed the broken glass-door with some scattered glass pane on the ground inside the shop-unit and outside. In view of all the above, the prosecution contends that the defendant was the one, who undoubtedly, committed the crime with the assistance of another person involved in this matter.

On the other side, the defendant - DW1 - testified in substance that he never committed any act of robbery as alleged by the prosecution. According to him, that particular evening from 3. 30 p. m to 8 p. m he was in the company of his wife Hazel Panagary - DW3 - and his son Emmanuel in his car driving around the island. At around 4. 30 p. m he went to St. Louis to drop his son at the house of his mother-in-law. Then he returned home at 7. 50 p. m. His neighbour Jenita was sitting in her veranda when he passed to park the car. He got into the house, went to his room and came to the living room; sat down in the sofa and watched television. While he was in the dining room, he asked his wife to go and get two cigarettes from Jenita, as she was friendly with them. His wife later came back with two cigarettes. He smoked the cigarettes and was waiting for the 8 o' clock news on TV and watched the news. He could not recall what was on the news that night. Then he went straight to bed. He denied that he was at the Petrol Station at around 8. 15 p. m and broke into the shop. According to him, although Mrs. Zialor knew him before, she has mistaken him for someone else. His wife Hazel also testified in support of his alibi. According to her, as soon as the news

on TV started, the defendant asked her to get cigarettes from one Jonny, the son of Jenita. Since Jonny was not in, she asked Jenita, who gave one cigarette and brought that one cigarette to the defendant. Subsequently, she stated that as she was looking for Jonny to get cigarettes, he came to her house and called her and gave one cigarette. The neighbour Jenita - DW2 - testified that "just when the television news started the defendant came in his car together with his wife" At around 10 or 15 minutes past 8 she heard someone calling outside. She asked her if her son (Jonny) was there. She said "No". Then, when he (Jonny) came, she told him that Hazel was looking for him. Then he went to Hazel. However, Jenita in her evidence did not mention about the cigarette incident at all. In the circumstances, the learned defence counsel contended in substance, that the defendant has established the defence of *alibi* and that there has been a *mistaken identity* by Mrs. Zialor (PW4). Hence, Mr. Bonte submitted that the prosecution had not established the case against the defendant beyond reasonable doubt. Hence, he moved the court to dismiss the charge and acquit the defendant in this matter.

I meticulously perused the entire evidence on record. I carefully analysed the submission made by both counsel touching on the issue of *alibi* and *mistaken identity*. Firstly, on the question as to credibility of the witnesses, I observed the demeanour and deportment of witnesses on both sides, when they testified in Court. From my observations, I conclude that all witnesses for the prosecution are credible and spoke the truth to the court. However, the defendant, his wife

and the neighbour did not appeal to me to be credible in their testimony. In any event, I find a number of inconsistencies and contradictions in the defence evidence. On the other hand, the evidence given by the prosecution witnesses are credible, cogent and corroborative in all material particulars constituting the offence levelled against the defendant.

First of all on the issue of **“mistaken identity”** I completely believe the testimony of Mrs. Zialor - PW4 - in that, I find and conclude that there was no mistake when she recognised the intruder as defendant, who broke open the glass-window, threatened the workers with a machete and extorted the cash Rs 4500/- from them. In fact, it was not a case of fleeting glance nor the witness had seen the assailant first time during the attack. Admittedly, Mrs. Zialor (PW4) had known the defendant for several years prior to the alleged incident. She had sufficient light, time, opportunity and circumstances to properly recognise the assailant during the whole episode of robbery. I have no reason to disbelieve her in any aspect of her testimony. Indeed, as identification evidence is disputed by the defence in this matter, I carefully examined this issue in the light of the *Turnbull guidelines vide R Vs Turnbull 1976*, giving necessary warning and due consideration to the relevant factors, which may collectively be called the Rule of **“ADVOKATE”**, if I may use this acronym to represent vertically the following factors:-

A - Amount of time the suspect was under observation by the

witness

D - Distance between suspect and witness;

V - Visibility at the time the witness saw the suspect;

O - Obstructions between suspect and witness;

K - Knows suspect or has seen him/her before;

A - Any particular reason for the witness to remember the

Suspect;

T - Time lapse since witness saw suspect; and

E - Error or material discrepancy in the description given by

witness.

Applying the above rule to the instant case, I am satisfied beyond reasonable doubt, that there is no *mistaken identity* in this matter. Mrs. Zialor (PW4) correctly and undoubtedly identified and recognized the assailant as defendant, when he committed the act of robbery. I have no doubt that, as she confirmed in her evidence, she was 100% sure that the defendant was the one, who committed the robbery at the material time, place and circumstances. I do not believe the defence evidence to the contrary.

For the defendant to succeed in his defence of alibi, obviously he should adduce evidence in support of **alibi**, which should unequivocally tend to show that by reason of the presence of the defendant:

➤ at a particular place; or

in a particular area at a particular time.

he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission. However, in the instant case the defendant has admittedly, been in the area of Point Larue, relatively closer to the place, where the offence has been committed and within the time frame, which is relatively proximate to coincide with that approximate time at which the offence has been committed. In such circumstances, it is more probable than not, the defendant could have been the one, who involved in the commission of the offence. In any event, I reject the defence evidence in toto, as none of the defence witness in my view, gave any credible, cogent, consistent and corroborative version to find an alibi in favour of the defendant. On the other hand, Mrs. Zialor (PW4) has given credible, clinching and consistent evidence as to the fact that she could very well recognize the defendant at the time, when he was committing the offence.

In the final analysis, and on a careful examination of the evidence on record, I find the following facts have been proved to my satisfaction to the required degree in criminal law:-

1. The defendant was the one, who along with another person unknown to the prosecution broke or smashed the glass-window of the shop-unit at around 8 p. m on 6th July 2008, at Point Larue Petrol Station, Mahé to gain entry therein.

2. After smashing the said glass window, the defendant was the one, who entered inside the shop through the broken window, with a machete in his hand and threatened the workers PW4, PW5, and PW6 with violence, in order extort the cash from them.

3. After a successful breaking and entering into the shop, the defendant was one, who stole the sum SR 4,500/- and immediately before the time of such stealing he did threaten to use actual violence by wielding a machete on the workers of the said Petrol Station in order to extort the said sum.

The last but not least, is the issue as to the standard of proof. In fact, the standard of proof defines the degree of persuasiveness, which a case must attain before a court may convict a defendant. It is true that in all criminal cases, the law imposes a higher standard on the prosecution with respect to the issue of guilt. Here the invariable rule is that the prosecution must prove the guilt of the defendant beyond reasonable doubt or to put the same concept in another way, the court is sure of guilt. These formulations are merely expressions of high standard required, which has been succinctly defined by **Lord Denning (then J.) in *Miller Vs. Minister of Pensions [1947] 2 All. E. R p372&973*** thus:

“It need not reach certainty, but it must carry a high degree of probability. Proof

beyond reasonable doubt does not mean proof beyond the shadow of a doubt.....

If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence “of course it is possible but not in the least probable” the case is proved beyond reasonable doubt, but nothing short of that will suffice”

Having said that, on a careful analysis of the evidence on record firstly, I find that the prosecution evidence is so strong and no part of it has been discredited or weakened or contradicted by any other evidence on record. I am sure on evidence, that there is no ***mistaken identity*** by Mrs. Zialor (PW4) when she recognised the defendant as and when he was committing the offence. Secondly, I am satisfied that the prosecution has proved the case *beyond reasonable doubt* covering the essential elements of the offences with which the defendant stands charged.

In the final analysis, therefore, I find the defendant **France Panagary** guilty of the offences of:-

- i) “Robbery with violence” contrary to Section 280 and punishable under Section 281 of the Penal Code under **Count 1- AND**
- ii) “Breaking into a Building and committing a felony therein” contrary to and punishable under Section 291(a) of the Penal Code.

Accordingly, I convict him of the offences under both counts, he is charged with.

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D. KARUNAKARAN

JUDGE

Dated this 23rd day of March 2009