

**R v Dodin & Anor (CO 3/2017) [2018]
SCSC 8074 (14 February 2018)**
[2018] SCSC 8074

CASE / FILE NUMBER
CO 3/2017

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Vidot J

JUDGMENT

- [1] The Accused are charged with one count as follows; Statement of Offence Robbery with violence contrary to Section 280 of the Penal Code (Cap158) read with Section 23 of the Penal Code and punishable under Section 281 thereof. Particulars of Offence Davis Dodin 35 years male unemployed of Glacis, Mahe, together with Nelson Marcelin, 32 years old casual labourer of Bougainville, Mahe, with common intention at around 21:50 hours of the 26th day of January 2017, at Union Vale, Mahe, robbed one Viral Dhanjee of SRI200/-, bottles of wine and rose sorbet squash worth SR800/-and at or immediately before the commission of such robbery, used and threatened violence against the said Viral Dhanjee, by threatening him with a knife. Prosecution's case [2] The Prosecution called a number of witnesses and produced as exhibit several items including a knife, clothing and a CCTV video footage of the incident that happened at the complainant's residence the evening of 26th January 2017. There was also a CCTV video footage capture at the Seychelles Yatch Club. A comprehensive account of the Prosecution's case is recounted through the evidence of Mr. Dhanjee.
- [3] Mr. Dhanjee testified that on 26th January 2016, at around 10pm he was under the varandah of his home, situate at Union Vale, talking over the phone. He noticed something unusual moving in the vicinity. He moved towards it and what he later identified as a person, sprung up and came towards him with a knife. Suddenly another person appeared. Their faces were covered with clothes. He could not identify them throughout the attack. However, the man with the knife was tall and slim and the other shorter but slim too. However, he took close note of the clothes on them and those which covered their faces. [4] The attackers wanted alcohol and money. The first attacker got hold of him and pushed him inside his house. The smaller attacker (without knife) kept saying to the other; "bleed him, bleed him ". He showed them the drink cabinet and the attacker without knife placed some alcohol bottles in a yellow plastic bag. He also gave them some cash amounting to SR12001-. The person with the knife insisted they wanted more. Once they had what they could get they exited the house but the person with the knife whilst menacing Mr. Dhanjee with the knife pushed him out too. He tried to pacify them by telling them they have what they wanted and to leave him be, but they still insisted he came out. They arrived back under the varandah where there was lighting but he was taken to the side of the house which was pitch dark. He was exceedingly concerned for his life at that time but he noticed there was a possibility of freeing himself from the way he was being held. Immediately as that opportunity presented itself, he used his free hand to hit out and freed himself. By the time the attacker reacted he was already far away and ran into the house and bolted the door. He sounded the alarm and he believed that as a result the attackers ran away. [5] He proceeded to call his son and friends and suggested that they post a report of the incident on Facebook to warn people of Union Vale to be on guard because there were armed attackers in the vicinity. His brother and police arrived as did his son and friends. [6] Mr. Dhanjee had CCTV camera in his house. The attackers had queried whether he had any and he had responded in the negative. A DVD (Exhibit P3) of the incident as it happened in the house was produced and it largely

corroborates the testimony of Mr. Dhanjee. That CCTV camera is linked to his other son in the UK. He got his son to get the footage of the incident downloaded and emailed to him. Mr. Michael Arnephy, friend of Mr. Dhanjee, posted the same on Facebook. The same was confirmed by the former who also testified before Court. The Police who had arrived at his home could also view that footage and immediately they could identify one of the assailant from his build and the way he walked. They had dealt with him on numerous occasions previously. To the officers, particularly SI Janet George, he resembled Davis Dodin (A1). [7] Mr. Arnephy testified that after he had uploaded the footage on Facebook, he was contacted by Charles Felton, Maintenance Officer at the Seychelles Yatch Club, who believed he could identify one of the attackers, namely the second Accused (A2) Mr. Felton could identify the white and black striped T-shirt that that attacker had used to mask his face. The identification was by way of recognition. [8] Mr. Dhanjee further testified that he was later shown some clothing by the police. These included grey short sleeved T-shirt cut into 2 pieces (Exhibit P6A), grey long sleeved T. shirt cut into 3 pieces (Exhibit P6B), white and black striped T-shirt (P9). He identified these after they were shown to him by police officers. He was adamant that he could identify both Exhibit P6A and P6B as the T-shirts the attacker with the knife was wearing over his face and body respectively. He said he had noticed that night that T-shirt P6B had a double sleeve and that the white and black striped T-shirt that the other assailant used to hide his face had a red stripe around the collar. [9] Since the CCTV camera was installed with its own microchip, the Police, namely Inspector Ivan Esparon accessed the same and produced a DVD (P3) of the incident. Mr. Dhanjee identified the footages from the DVD as projected in court. Inspector Esparon also received access to CCTV footage from Eric Zoe, Manager of the Yatch Club depicting a black man wearing a black and white striped T-shirt and a black woollen cap (hat) in the parking area of the Yatch Club. According to the Prosecution that person is A2 who had been recognized by Mr. Charles Felton. The clothing places A2 at the crime scene. Furthermore, A2 gave a Statement under Caution to the Police admitting to his participation together with another person in the attack at Mr. Dhanjee's house. [10] It is the Prosecution's case that based on the CCTV footages, the clothing, the confession, the evidence of recognition by witnesses, it is beyond reasonable doubt that the Accused were the persons who attacked Mr. Dhanjee at his home on 26th day of January 2017. The Defence Case

- [11] The defence case is essentially one of mistaken identity. Following from the line of cross examination, they are claiming that there is no direct evidence that links the Accused to the crime, particularly since the CCTV footage showed the assailants' faces being masked by clothing and the complainant while giving evidence testified that he could not identify the persons who attacked him on that night of 26th January 2017. When asked as to whether the Accused resembled the attackers, the complainant had further testified that the Accused looked fatter. The complainant nonetheless described the physique of the persons who attacked him on that unfortunate evening. He was nonetheless not certain as to the identity of the persons who committed this criminal act against him. [12] The first Accused even suggested that he had a defence of alibi, in that it was averred and he testified from the dock

that he was with his girlfriend at Copolia on the night of the incident. However, despite alluding to the alibi, the first Accused did not call any evidence in support. [13] The second Accused maintained that the Confession which the Court admitted following a voir-dire was involuntary and extracted from him under duress and in complete breach of the Judges Rules. He claims that SI Jeanette Georges had promised him an advantage in that he would be released, without charges levelled against him if he gave the confession. It is his testimony that he was duped by the Police into believing that the first Accused had implicated him in the offence. The Accused further challenged any connection between exhibits collected that the Prosecution produced to support the allegations against them. They dispute any causal link between those exhibits, particularly pieces of clothing and a knife (P5B), to the Accused. They also challenged the manner in which some of these items were collected, particularly that the Accused were not confronted with these exhibits so that they could in the least provide an explanation for the exhibits found in their possession. [14] I note that after the Accused were explained their legal and Constitutional rights at the close of the case for the Prosecution, they opted to give evidence from the dock. Such evidence carries little weight if any at all. Dock statements is tantamount to no evidence at all. The Law 1. Circumstantial Evidence.

- [15] This is a case that relies considerably on circumstantial evidence. There isn't any witness who testified seeing the Accused at Mr. Dhanjee's residence on the evening of 26th January
2017. The latter had testified that he could not identify his assailants as their faces were covered, though as already mentioned he gave a description of their physique and the clothing used to hide their faces.
- [16] Circumstantial evidence are pieces of evidence that when put together leads to the conclusion of the Accused culpability for the offence charged. The circumstances should be inconsistent with the Accused innocence. In essence such evidence which is afforded not by direct eye witness testimony of the fact to be proved, but by the weight upon that fact or other and subsidiary facts relied upon as being inconsistent with any result other than the truth of the principal fact. Such evidence must be sufficiently proximate to the principal fact or the factum probandum; see *G. Gabriel v State of Kerala* r1982] Ker LT
772. Circumstantial evidence can be conclusive or presumptive. It is conclusive when the connection between the principal and the evidentiary facts, the factum probandum and factum probans, is a necessary consequence of the law of nature. It is presumptive when the inference of the principal fact from the evidentiary fact is only probable whatever the degree of persuasion which it may generate; vide *Sarkar Law of Evidence*, 6th Edition, Vol 1, which also describes such evidence as "circumstances leading to a fact in issue that taken together form a chain of circumstances leading to the existence of the principal fact" (page 82). [17] *Sarkar Law of Evidence* (supra) also identifies the test to be followed in assessing circumstantial evidence. They are; I. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; 11. those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and

111. the circumstances taken cumulatively, so form a chain so complete, that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and no one else. [18] Therefore, the burden is on the Prosecution to establish beyond reasonable doubt that the circumstances from which the conclusion is drawn is fully proved; the circumstances should be conclusive in nature, that all the circumstances should be consistent with the hypothesis of guilt and inconsistent with innocence. Such circumstances should be of a high degree of certainty as to exclude the possibility of guilt of any other person than the Accused. [19] Sarkar Law of Evidence (supra) (page 83) citing the case of *Brijlal Prasad v State of Bihar* [1998] 4 scale 25 noted that "the circumstances proved should lead to no other inference except that of guilt of the accused, so that the accused can be convicted of the offences charged. It may be stated that as a rule of caution that before the court records a conviction on the basis of circumstantial evidence, it must satisfy that the circumstances from which inference of guilt could be drawn have been established by unimpeachable evidence and the circumstances unerringly point to the guilt of the accused and further all the circumstances taken together are incapable of any explanation on any reasonable hypothesis save that of guilt of the accused. s s [20] I shall when evaluating the circumstantial evidence be guided by the legal position as discussed above. I shall when doing so bear in mind that circumstantial evidence is in fact considered to be direct evidence that is indirectly applied. This is because circumstantial evidence is direct as the testimony is that of persons who saw, heard or perceived the series of such facts relevant to the offence. 11. Identification

[21] As aforementioned the Defence hinges principally on the defence of identification. The general rule is that when identification is in doubt, it is for the Judge to administer a Turnbull warning, see *R v Turnbull*

[1976] 63 Cr. App. R 132. I remind myself of such warning in this case. A Turnbull warning is necessary when the defence attack the veracity of the identifying witnesses; see *R v Cape* [1996] 1 Cr. App. R 191 CA. However, in this case, veracity was in my view not challenged; it was either that there was no identification at all or that the witnesses such as SI George who gave evidence of recognition could have been mistaken. Turnbull, however, has applicability primarily to cases of fleeting encounters identification; see *R v Oakwell* 66 Cr. App. R 174 CA. It does not apply to every case of minor identification problems; *R v Curry and Keeble* [1983] Crim. L. R 734 CA. This court acknowledges that identification was a major issue in this case; the complainant could not even make a dock identification of the Accused as being perpetrators of the serious crime against him and his property; see also *Estro v R* [1983-1987] SCAR 134 and *Labaleine v R* [1983-1987] SCAR 167. 111. Confession [22] In this case A2 made a confession which was admitted in evidence after the holding of a voir-dire. In her closing submission, Counsel for A2 revisited the arguments raised at the voir-dire to maintain that the confession was obtained through inducement from Police Officers. I shall not herein reconsider that issue and maintain the ruling delivered following the voir-dire. [23] Sarkar Law of Evidence (supra) notes that a confession cannot be used against a co accused, though it may, taken with other facts be taken into

consideration (p2277). Citing *Moyez v R* 40 CLJ 551, it goes on to state that a retracted confession of a co-accused is not testimony of an accomplice; therefore the question of relevancy does not arise. [24] In the case of *Regina v Hayter* [2005J UKHL 6, an appeal from the Court of Appeal to the House of Lords, it was emphasized as follows; "A voluntary out of court confession or admission against interest made by a defendant is an exception to the hearsay rule and is admissible against him A confession is however generally inadmissible against any other person implicated in the confession" [25] The House of Lords referred to the Digest of the Law of Evidence (12th edition)(1936), where the rationale of the rule was stated by Sir James Fitzjames Stephen as follows (at page 36); "A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed the crime. Confessions, if voluntary, are deemed to be relevant facts as against the person who makes them only. " [26] In addressing issues of this case, particularly as far as A1 is concerned, I shall bear in mind the general position as above rehearsed and also remind myself of the auxiliary rule that in a joint trial not to rely on the confession of one accused against another co-accused. Analysis; Evaluation of Law and Facts. [27] The Accused's defence is as stated before heavily reliant on the fact that there was no direct identification of the perpetrators. Their faces were masked. Counsel for A2 laboured lengthily on the fact that it would be unsafe to rely on the complainant's testimony that at the time the assailants were at his home, threatening him he focussed on the clothing the assailant used to mask their faces. I note nonetheless that he noticed that one of them had a black and white striped T-shirt and that other had a T-shirt which had double sleeves. I will note that as far as A2 is concerned there was another CCTV video that Inspector Ivan Esparon recovered from the owners of the Seychelles Yatch Club. The video shows a person wearing a T-shirt totally similar to the one being wore by one of the assailant at the complainant's residence when he was being robbed. [28] The video footages are definitely a piece of direct evidence. On their own or individually they do not necessarily link the accused to the crime. That is why the Court has to look for other pieces of evidence, which in this case are mostly circumstantial. In the case of A2, a pertinent piece of evidence corroborating the CCTV footages is the confession that I shall address further below. [29] In *Jose Nenesse v The Republic* SeA 35 of 2013 (delivered on 12 August 2016) the Court of Appeal dealt extensively with the issue of identification / recognition and in particular through CCTV footages. In that case too, the Accused had his face masked but one witness identified him from his body structure. The Court of Appeal explained extensively the legal admissibility of CCTV footages. The Court of Appeal referred to *Mpumlo & Others* (3) SA 485 (E) and *Montana v Nair* No. 2009 9(2) SA 575 (T) where it held that "a video film, like a tape recording is real evidence as distinct from documentary evidence, and provided it is relevant it may be produced as admissible evidence, subject of course to any dispute that may arise either as to authenticity or interpretation thereof". I have already found that the video footages are very relevant to this case. They were admitted without objection. [30] In *Jose Nenesse v Republic* (supra), the Court explained that surveillance video evidence from CCTV cameras is admissible under section 1S(1) read with section 1S(11) of the Evidence Act. Section 1S(1) states that:

(a) the computer was used to store, process or retrieve information for the purposes of any activities carried on by anybody or person; (b) the information contained in the statement reproduces or is derived from information supplied to the computer in the course of these activities; and (c) while the computer was so used in the course of those activities (i) (U) appropriate measures were in force for preventing unauthorized interference with the computer; and the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation, was not such as to affect production of the document or the accuracy of its contents. "A "computer" has been defined in section 15(11) as: "(a) any electronic device for storing, processing or retrieving information, and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process; and (b) any other device or category of device which the President may by Notice published in the Gazette specify. n [31] SI Janet Georges testified that immediately after viewing the CCTV footage at Mr. Dhanjee's house, she could recognise A1 from his physique and walk. Basically the officer was testifying that there were some characteristics of A1 which were familiar to her. In fact she testified that A1 was known to her as on several occasions she has had to deal with him in relation to other incidents. Mr. Dhanjee corroborates SI George's testimony in that he confirms that upon watching the video the officer indicated that she could recognize A1. In *Jose Nenesse v The Republic* (supra) citing *Fawden* 19821 Crim LR 588 and *Kajala v Noble* (1982) 75 Cr. 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 guidelines in *Turnbull* (supra) "recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made" see *Republic v Allan Ah-Kong* SCSC 69 of 2004 (unreported). I also bear in mind that A1 is not a relative nor a friend of SI George, but I am satisfied that since she had dealt with him on numerous times she could make a safe recognition of him. I am confident that the recognition by SI George was credible and safe and note that this is further evidence that places A1 at the scene of the criminal act at the time of the accident. and the cut clothing retrieved from A1's cell also bears a logo. Furthermore, SI Georges also testified that one of the assailant wore a long sleeve T-shirt that had a black stripe near the seam of the sleeve (P6B). Again, the clothing seized from A1 had similar black stripe at the seam. It is what the Complainant referred to as a double sleeve. [37] SI George also seized a pair of multi coloured shorts (Exhibit P6C) which was found in A1's cell at the Mont Fleuri Police Station. The same had been torn into 4 pieces. SI George noted that the shorts appear strongly similar to those being worn by the assailant who was brandishing a knife at the complainant as appeared in the video footage. The similarity between exhibit P6C and the shorts as shown in the video footage arises serious suspicion and amounts to overwhelming circumstantial evidence that points towards no other hypothesis but guilt.

[38] Archbold 2012 Edition, paragraph 14-28, citing R V Hickin [1996] Crim. L. R 584 provides that "recognition of clothing can be a valuable aid to identification" but warns that "where a witness does no more than describe the offender's clothing, an identification procedure would serve no useful purpose JJ see March v DPP [2007] Crim. L. R 162 CA. I am satisfied that in the present case the Prosecution has adduced evidence beyond mere identification of the clothing. The CCTV footages and clothing themselves were produced to support the identification. [39] This Court finds that the identification of the Accused by the clothing that was retrieved from his possession overwhelming, and that supported other both circumstantial and direct evidence support the count levelled against the Accused. [40] SI George further noted that in the video footage of the incident at the complainant's house, whilst the attackers are seen entering the house with the complainant and threatening him with a knife, one of them had said; "bez li, bez li, bez li Davis, bez li. JJ Having viewed the footage numerous times, I find that such words were in fact said (see footage at 21hrs 53mins). I am aware that the complainant had testified that the assailant had said "bleed him, bleed him JJ. I don't find such discrepancy significantly material and does not in any way whatsoever, casts doubt on the bulk of Mr. Dhanjee's testimony. I note however that at some point the attackers were talking to the Complainant in English. 13

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