IN THE SEYCHELLES COURT OF APPEAL

Criminal Appeal No. 1 of 1994

DANIEL DOGLEY APPELLANT

V

THE REPUBLIC RESPONDENT

Before A.M. Silungwe, E.O. Ayoola and L.E. Venchard, JJS

Mr. J. Renaud for the Appellant
Mr. A. Fernando for the Respondent

Judgment of the Court

The appellant, a soldier in the Seychelles Army, was tried on two counts of firstly, attempted murder; and, secondly, doing an act intended to cause harm, contrary to sections 207(b) and 219(f) (respectively) of the Penal Code. The particulars of the first count alleged that on March 7, 1992, at L"Exile Army Camp, Mahe, the appellant, with intent to unlawfully cause the death of Georgie Souris, had poured a poisonous substance into an aluminium jug of water which had been kept at the mess for drinking purposes by the army personnel attached to the Camp, which was likely to endanger human life. He was not convicted on the second count on the ground that this should have been charged as an alternative to the first count. He was, however, convicted on the first count and sentenced to a prison term of 8 years. This appeal is against sentence.

The gist of the case against the appellant is that he had an axe to grind against a fellow soldier by the name of Georgie Souris with whom he had experienced certain

problems. He spoke of Georgie, in these terms:

> "For quite sometime I have been involved in problems with Georgie. The problem for which I am involved with him is that he is always next to the telephone in the mess. When the telephone rings he takes it. If for example your wife is on the phone he tells lies and says that you are not there. He then fixes a "Rendez-vous" with your wife. In my case Georgie has done that on several occasions and has made me get involved into problems with my wife. The said Georgie is also fond of black magic. Last Thursday after I had come from escort duty Georgie said something which offended me. Georgie said that he would always do these types of things just as putting him into trouble and that nobody is able to do anything to him. I did not answer him and I did not like it. When Georgie does these types of things he is tolerated by his N.C.O.s. On Saturday 7 March 1992 at around 5.15 p.m. I decided to do some mischief to Georgie ....."

This narrative lays bare what the appellant's motive in the matter was all about. The poisonous substance that he put into the jug containing drinking water, in anticipation that Georgie Souris would partake of the contaminated water, was subsequently analysed and found to be rogor which was described as a deadly poison used as a pesticide.

In his submission, Mr. Renaud urged us not to be influenced by the fact that the charge was one of attempted murder. He invited us to accept his prayer that the sentence of imprisonment for 8 years was manifestly excessive, considering the circumstances of the case. These circumstances where (a) that noone would have drunk the poisoned water because of the strong smell due to the presence of rogor in it and that this had been detected by some soldiers; (b) that the appellant was a first offender; (c) that he was a young man; and (d) that, being subject to

military discipline, he had been detained for three months by military authorities, through not at the behest of a Court Marshal.

Mr. Fernando for the respondent contended that a court of appeal will not normally interfere with sentence as this is in the discretion of the sentencing court. He cited, inter alia, paragraph 7-147 of Archbold 1992 edition, Vol.I, which relates to broad principles on which courts act. Therein is an English case of R. v. Neysorne and Browne (1970) 54 Cr. App. R. 485 where Widgery L.J. stated in broad terms that an appellate court will interfere when:

> (i) the sentence is not justified by law, in which case it will interfere not as a matter of discretion but of law;
>
> (ii) where sentence has been passed on the wrong factual basis;
>
> (iii) where some matter has been improperly taken into account or there is some fresh matter to be taken into account; or
>
> (iv) where the sentence was wrong in principle or manifestly excessive."

It is there pointed out that these categories are not exhaustive and that they overlap with each other.

Mr. Fernando further submitted that he had checked the record of appeal but that he could not confirm whether the appellant had been detained by military authorities as a consequence of this case. He stated that the sentencing court had taken into account the fact that the appellant was a young man and a first offender; and urged that deterence should apply to this case.

When the Court drew attention to the fact there had

been no address by the appellant or by learned counsel representing him, prior to the passing of the sentence, Mr. Fernando said that section 266 of the Criminal Procedure Code (C.P.C.) was silent on the matter but that it was a practice to allow learned counsel for a convict to address the court on the question of sentence.

Having given due consideration to all the submissions before us, we take the view that where an appellate court is considering interference with a sentence under principle (iii) above, i.e. "when some matter has been taken into account, ..." the court should equally be entitled to take into account a material matter which, not being fresh, has not, or does not appear to have, been taken into account by the sentencing court.

Further, we are of the view that, although section 266 of the C.P.C. is silent on the question of addressing the court before that court passes sentence on a convict, it is in the interests of justice for the court to accord an opportunity for such an address to be made as the address will invariably, or is intended to, assist the court in deciding an appropriate sentence to pass.

In the instant case, there is nothing to indicate that the sentencing court took into account the fact that noone had been hurt or could have been hurt, as a result of the appellant's action due to the strong smell of the poisonous substance in the contaminated water. We regard this matter as a material mitigating factor but are unable to say whether the sentencing court would have passed the sentence appealed against had it taken this factor into account prior to the imposition of the sentence. In these circumstances, we would interfere with sentence under principle (iii) supra. The appeal is allowed and the sentence is accordingly

reduced to 5 years imprisonment.

A.M. Silungwe
Judge of Appeal

E.O. Ayoola
Judge of Appeal

L.E. Venchard
Judge of Appeal

Delivered on 12th August, 1994