(6)

IN THE SEYCHELLES COURT OF APPEAL

PHILIP CESAR APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

Criminal Appeal No. 8 of 1997

(Before Goburdhun, P., Silungwe and Venchard, JJA)

.....

Mr. F. Elizabeth for the Appellant
Ms. L. Pool for the Respondent

JUDGMENT OF THE COURT
Delivered by Silungwe, J.A.

This is an appeal against both conviction and sentence from the judgment, on appeal, of the learned Chief Justice. The appellant was tried in the Magistrates' Court for breaking and entering into a building, namely, African Jewels, a shop at Victoria, Mahe, and stealing therein items of property belonging to the said African Jewels and altogether valued at R66,658, contrary to section 291 as read with section 260 of the Penal Code. He was convicted as charged and sentenced on May 6, 1996 to 5 years' imprisonment which, on appeal to the Supreme Court, was reduced to 3½ years imprisonment.

The only ground of appeal against conviction relied upon by Mr. Elizabeth, learned counsel for the appellant, is in these terms:-

"The learned Judge erred in his findings at page 2, 3rd paragraph that 'I agree with Mr. Danny Lucas, counsel for

the appellant that indeed in a case of theft where an item which is alleged to have been stolen from a complainant was in fact recovered and is produced in evidence in the case, the complainant must identify that item for the court to reach a conclusion that the item which had allegedly been stolen had indeed belonged to the complainant. In this case, however, I do not think that that omission is fatal to the conviction of the appellant. The failure of the prosecution to prove an essential ingredient of the offence, namely, appropriation of something belonging to another, beyond a reasonable doubt. In the circumstances, the appellant ought to have been acquitted.

In all the circumstances of the case the conviction of the Appellant is unsafe and unsatisfactory."

A reading of the evidence adduced before the learned senior magistrate shows that a prosecution witness - the investigation officer in the case - produced certain recovered items of property which were admitted in evidence and marked as exhibits P11, P12 and P13 but, when the evidence of the complainant was led, there was an omission to ask her to identify the recovered exhibited items of property. Mr. Elizabeth contends that that omission is fatal. However, Ms. Pool, learned counsel for the respondent, argues that, in the circumstances of the case, the said omission is not fatal.

It is an elementary principle of criminal law that, in a case such as the one under consideration, it is incumbent upon the prosecution to prove that the items of recovered stolen property produced in court are linked - through

identification - to the items of stolen property charged in the particulars of the offence. Failure to do so may, in appropriate cases, be fatal.

However, the present case is not such a case. Here, there are two aspects of evidence that militate against the appellant. Firstly, there is the evidence of his own confession to the commission of the crime charged which was admitted without any objection. In that confession, the appellant admitted theft of certain items of property which in itself constitutes cogent proof of the theft of those items. It follows, therefore, that, in so far as those items of property admitted by the appellant himself are concerned, the prosecution's failure to adduce evidence of identification is neither here nor there.

Secondly, the evidence of Detective Sub-Inspector R. Elizabeth - a finger print expert - is conclusive in relation to the appellant's involvement in the commission of the crime charged.

For the reasons given, it goes without saying that the argument advanced by Mr. Elizabeth cannot possibly succeed. Accordingly, the appeal against conviction is dismissed.

The only issue that remains to be considered is sentence. In Mr. Elizabeth's submission, the sentence of 3½ years which the Supreme Court imposed in its appellate jurisdiction upon the appellant is manifestly harsh and excessive in all the circumstances of the case.

Our inclination in the matter is towards interference, not for the reasons given by Mr. Elizabeth, but because we feel that the sentence is wrong in

principle. This is so because, where at least two or more persons are charged jointly or with offences arising from the same circumstances, care should be taken, on conviction, to ensure that the interests of parity are (as far as possible) observed. It is important that, in dealing with such type of offenders, the imposition of widely varying sentences should not, as a general rule, be resorted to unless good reasons exist for doing otherwise.

In this case, a co-accused who pleaded guilty to receiving stolen property, contrary to section 309(1) of the Penal Code, was given one year imprisonment which was suspended for two years. Although the appellant pleaded not guilty to the charge, we feel that the disparity between the reduced custodial sentence of 3½ years and the one year suspended sentence is not only unjustified but also wrong in principle, for the reasons already stated.

In the result, the appeal against sentence succeeds. The sentence of 3½ years is, therefore, set aside and, in its place, a sentence of one year is imposed but suspended for a period of two years during which he should not commit any offence involving dishonesty, in terms of section 282(1) of the Criminal Procedure Code, Cap. 54 of the laws.

Dated this 14th day of August, 1997.

.....	.....	.....
H. GOBURDHUN	A. SILUNGWE	L. E. VENCHARD
PRESDIENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Handed down
ADAM JA