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IN THE SEYCHELLES COURT OF APPEAL

METTASINGHE ARATCHIGE GERARD FERNANDO APPELLANT

Versus

THE REPUBLIC RESPONDENT

Criminal Appeal No: 19 of 1998

[Before: Goburdhun, P., Silungwe & Ayoola, JJ.A]

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Mr. A. Derjacques for the Appellant
Mr. M. Vidot for the Respondent

JUDGMENT OF THE COURT

(Delivered by Ayoola, J.A)

Mettasingh Aratchige Gerard Fernando, ("the appellant") was convicted by the Supreme Court (Alleear, C.J) of nine offences of unauthorised fishing in Seychelles waters contrary to Section 24(1) of the Fisheries Act (Cap 82) and punishable under Sections 24(1) and 25 of the said Act as amended by the Fisheries (Amendment) Act No. 3 of 1997; upon his plea of guilty to those offences charged in nine of the twelve counts of the charge. He was sentenced to fines of SR250,000 on each of the nine counts with an order that such fines should be paid within three months and in default of payment he should go to prison for six months such prison terms in default of payment of the fines to run consecutively. The vessel used for the commission of the offences was forfeited to the State with everything on board excluding the crew. The appellant has appealed against his conviction and sentence.

There are two grounds of appeal against his conviction as follows:-

> "1. The Honourable Judge erred in law in accepting that the appellant should take

the plea in eleven counts whereas the said charge should have made out in a single count i.e Unauthorised Fishing in Seychelles Waters contrary to Section 24(1) of the Fisheries Act (Cap 82) and punishable under Section 24(1), and 25 of the said Act as amended by the Fisheries Amendment Act 3 of 1997.

With particulars stating
"...namely inside the exclusive economic zone of Seychelles during the period from the 29th day of April 1998 to the 7th of May 1998."

"2. The Honourable Judge erred in law in failing to order that the offence reflected a single illegal transaction and not eleven separate transactions."

The argument proffered by counsel for the appellant in support of these grounds is that an unauthorised fishing expedition in the exclusive economic zone involving a single entry into that zone and fishing therein was one continuing act which should have been charged as a single offence.

Section 24(1) of the Act which creates the offence with which the appellant was charged, reads as follows:-

> "Where any foreign fishing vessel that is not licensed in accordance with Section 7 or authorised under Section 17 is used for fishing in Seychelles waters or for fishing for sedentary species on the continental shelf, the operator and master shall each be guilty of an offence ..."

The act forbidden by that subsection is committed whenever an unlicensed or unauthorised fishing vessel is used for fishing for

sedentary species in the continental shelf. The offence section of the Act, Section 24, did not make it an offence for a fishing vessel as was described in subsection 1 of section 24 to be found in Seychelles waters; except for subsection 6 of section 24 which made it an offence for such fishing vessel to be found in Seychelles waters without its gear stowed in the prescribed manner. The prescription for stowage is contained in regulation 9 of the Fisheries Regulations which showed that the intention of the makers of the law was to ensure that an unlicensed or unauthorised fishing vessel found in Seychelles waters shall keep its fishing gear stowed in such a manner that it could not be said that the vessel was being used for fishing.

An offence is complete when the prohibited act is done either with the necessary mens rea where such is an ingredient of the offence or without need to establish any mens rea in case offences of strict liability. Section 111 of the Criminal Procedure Code ("the Code") provides that offence or offences charged should be specified in the charge or information with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. Section 112(1) of the Code permits the joinder of offences in the same charge or information if the offences charged are founded on the same facts or form, or are part of, a series of offences of the same or similar character. Where more than one offence is charged in a charge or information, a description of each offence so charged must be set out in a separate paragraph of the charge or information called a count: Section 112(2) of the Code.

In this case the allegation in each of the twelve counts contained in the charge was that on the day specified in the particulars of offence of each count the appellant committed the offence described in the count. The offences which were all of the same or similar character were alleged to have been severally committed on days from the 29th May 1998 to 10th June 1998. The appellant pleaded not guilty to the offences charged in Counts 1, 2 and 12 of the charge on the ground that he did not "lay the nets" on these days, meaning, apparently, that he did not use the vessel for fishing on those days. To the rest of the charge he pleaded guilty while the prosecution accepted his plea of not guilty in respect of

counts 1, 2 and 12. From these facts it is evident that the appellant was not in any doubt as to the offences charged and that the charge related to several offences albeit of same or similar character.

On the face of the charge there was nothing to show that only one offence had been committed. Indeed, by pleading not guilty to some of the counts the appellant manifested his awareness that several offences were charged. That the several offences were of the same or similar character would not justify the charging of those offences as one. Where an accused contends that he should have been charged with one offence and not several, such issue should be raised expressly when he was asked to plead to the charge or, indirectly, by pleading not guilty to the charge. It is futile to raise such issue on appeal when the accused had pleaded guilty to several of the counts and the facts narrated by the prosecutor have not shown that a single continuous offence has been charged under several counts.

Interesting and ingenious as the point raised by counsel for the appellant in respect of the appellant's conviction may appear to be, the contention is without substance. The law is clear that duplicity is a matter of form. What is being canvassed is the converse of duplicity about which the law is silent. When the complaint is, as in this case, that the appellant should not have been made to plead to a charge, what is implied is that the charge was not in proper form. Nothing, as has been said, on the face of the charge in this case shows that it was not in proper form. Indeed, we venture to think that the charge was of series of offences of a similar character committed on the days separately charged and that the charge was properly laid. In the result the appeal against conviction must fail.

In regard to the appeal against sentence it was argued by counsel on behalf of the appellant that the sentences were harsh and excessive because (i) the aggregate of the fines (SR250,000 for each count) for nine counts approximated to the maximum of SR2,5 million to which an offender could be liable for an offence; (ii) the offences should have been treated as one single transaction.

In passing sentence the learned Chief Justice has had this to say:-

> "In passing sentence I have borne in mind that we have to protect our stock of fish. We cannot allow others to come and deplete our stocks.
>
> .....Before 1997 the maximum sentence prescribed by law for this offence was SR10,000 fine for each offence. In 1997 the legislators of this country decided that the maximum sentence should go up and it is now SR2.5 million rupees for each offence.
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> .....By prescribing for such a huge amount by way of a fine, the legislators provided a great deterrent. The court must give effect t the will of the people as expressed by the legislature."

It has been rightly said that; "In determining the amount of a fine, the 'first duty' of the sentencer is to 'measure that fine against the gravity of the offence" (R. v Messane (1981) 3 Cr. App. R (S) 88, CSPJ1. 2(b), per Kenneth Jones J). The gravity of the offence in this case is reflected in the maximum sentence to which the appellant was liable. The sentence passed on each count cannot be said to be excessive and harsh in relation to the maximum fine to which the appellant was liable. What seems to have given counsel for the appellant some concern is the gravity of the aggregate of the fines imposed. Sentences of fine are usually cumulative. There is nothing to show that the Chief Justice has not related the aggregate of the sentences of fine to the aggregate of the fines to which the appellant was liable. The principles on which an appellate court would interfere with the sentences passed by the trial court is too well established to need restatement. It is not for us to substitute what we may have been disposed to impose as sentence for that of the trial court. It is sufficient to say that we do not think that the sentences passed by the Chief Justice are manifestly harsh and excessive for such offences of manifest gravity and potential danger to the

economy of the country. In the result, the appeal against sentence will also be dismissed.

For these reasons we dismiss the appellant's appeal in its totality.

Dated at Victoria, Mahe this ....13th.... day of ***August*** 1998.

H. GOBURDHUN	**A.M. SILUNGWE**	**E.O. AYOOLA**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**