IN THE SEYCHELLES COURT OF APPEAL

WARNAKULASURIYA FERNANDO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

Criminal Appeal No. 12 of 2000

[*Before*: *Ayoola, P., Silungwe & De Silva, JJA]*

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Miss. K. Domingue for the Appellant
Mr. R. Govinden for the Respondent

JUDGMENT OF THE COURT

(Delivered by Silungwe, J.A.)

This is an appeal against both conviction and sentence. The appellant appeared before the Supreme Court (Juddoo, J.) charged with five counts of unauthorised fishing in Seychelles waters, contrary to section 24(1) of the Fisheries Act (Cap.82) (the Act), as amended by the Fisheries (Amendment) Act No. 3 of 1997 and, section 25 of the Act. It was alleged that on May 14, 15, 16, 17 and 18, 2000, being master of an unlicensed fishing vessel - "Torrington" - he used it for fishing in Seychelles waters. He pleaded not guilty to all the counts but was, after trial, convicted as charged and sentenced on each count to a fine of Sr.250,000/- or 6 months' imprisonment in default of payment; and the sentences were ordered to run consecutively. The appellant was given three months within which to pay the fine. Further, a forfeiture order was made.

The facts of the case are essentially not in dispute. The appellant is a Sri Lankan national and the fishing vessel - "Torrington" - is also Sri Lankan. The appellant is master of the fishing vessel and had at the material time a six-member crew. He was fishing within the exclusive economic zone of Seychelles about 120 to 124 nautical miles from the port of Victoria; and the fishing vessel was neither

licensed nor authorised to undertake fishing activities within Seychelles waters. The appellant made a voluntary confession in which he admitted having been involved in fishing on May 14, 15, 16 & 17, 2000, but denied having done so on May 18, 2000. The prosecution evidence which the learned trial judge accepted, however, shows that the appellant was caught red-handed on that date. Further, the appellant testified he had not been aware that he had overstepped the boundary of international waters. But it is trite law that, as a general rule, ignorance of the law is not an excuse to criminal liability.

In regard to the appeal against conviction, the only issue raised on behalf of the appellant is whether the learned trial judge properly explained to the accused, at the close of the case for the prosecution, what his rights of election were. This finds expression is the sole ground of appeal which is couched in these terms:

> *"The learned Judge was wrong in his direction that: 'We cannot accept the writing, if you want to give evidence you have to go in the box'".*

On the appellant's behalf, it is submitted that the direction was a fundamental error of law and procedure since the appellant did not have to go into the witness box to give evidence or indeed to do anything. It was thus wrong, the submission continues, for the learned judge to direct the appellant to go into the witness box. It is contended that the direction was contrary to the judge's previous direction to the appellant on the law.

Mr. Govinden's response, on behalf of the respondent, is that the learned judge properly complied with the requirements of the law and that there was no contradiction of what he had previously said.

To put the foregoing submissions in context, it is convenient to make reference to the record of appeal, the relevant parts of which read (at page 64, 65 and 66) as follows:

> *"Court to Accused: The prosecution has now closed (sic) its case. You have the right to remain silent or to give evidence. If you decide to give evidence questions will be put to you by counsel for the prosecution. You also have the right to make an unsworn statement in the dock where you are sitting and no questions will be put to you. ..."*
> *Mr. Govinden: ...my lord, Mr. Gooneratne who also knows Singhalese language says there has been some problem in interpretation of whatever your lordship was saying to the accused. ...*
> *... there has been some misinterpretation on the part of the translator. If you can repeat to the accused ...*
> *Court: I will repeat that. You also have the right to make an unsworn statement where you are sitting there but the weight of the statement will be less to the Court and you have the right to call witnesses on your behalf and to produce any documents which you think relevant to your case.*
> *Accused: I have no witnesses but have some letters which I have written.*
> *"Court: We cannot accept the writing. If you want to give evidence you have to go in the box.*
> *Accused I will go in the box."*

The above excerpt clearly illustrates that the appellant's rights of election were properly explained to him and that the appellant elected to give evidence in the witness box. The impugned portion of what the learned judge said was prefaced by the expression: "*If you want to give evidence ...*" The accused's response was that he would give evidence. We see neither a contradiction nor a misdirection in what the learned trial judge said in this regard. There was thus no failure of justice. It would appear that the challenge against conviction is an attempt to pick holes in the process of adjudication where none exist. In any event, there was ample evidence for the prosecution, inclusive of the appellant's unchallenged confession, to justify the finding of conviction. In the circumstances, this ground fails.

In so far as the appeal against sentence is concerned, it is alleged that the sentences of imprisonment passed under counts 1 to 5 inclusive are unlawful, null and void and that, as such, they should be quashed and the appeal should be allowed. It is argued that as Seychelles was a participant in the Third United Nations Conference on the "Law of the Sea," and subsequently ratified a Convention

in that regard on September 16, 1991, her domestic laws are subject to the said Convention and that, in the event of a conflict, the Convention takes precedence over the laws of Seychelles. It is further submitted that Article 73(3) of the Convention specifically provides that penalties for violations of the Fisheries Laws and the Regulations made thereunder may not include "imprisonment".

Mr. Govinden's reaction, however, is that the appeal against sentence is frivolous and devoid of merit in that since the Fisheries Act (Cap.82), as amended by Act No.3 of 1997, (subsequent to the ratification of the Convention), the Legislature is deemed to have taken into account the scope of the Convention.

Article 73 of the Convention (which relates to the enforcement of laws and regulations of Coastal States) reads:

> *"73 (1). The Coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.*
>
> *(2). .....*
>
> *(3). Coastal State penalties for violations of fisheries laws and regulation in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.*
>
> *(4). ....."*

And section 24(1) of the Act, as amended, provides that:-

> ***"24(1)*** *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 and liable on conviction to a fine of SR2,500,000."

Prior to the 1997 amendment, the maximum fine was SR10,000. This substantial increase in the maximum penalty obviously serves to demonstrate the seriousness with which the legislature regards any unauthorised fishing within the nation's exclusive economic zone.

A reading of section 24(1) of the Act shows that it makes no provision for imprisonment. Hence, the Fisheries Act does not fall foul of the convention. However, the trial court imposed sentences of imprisonment in default of payment of fines. Although no reference was made to statutory provisions for such sentences, it is probable that these were derived from section 294, as read with section 295(1), of the Criminal Procedure Code (Cap 54) which provides for a sentence of imprisonment in default of payment of a fine. This is apparently the context in which the appeal against sentence is made. A question that readily comes to mind is whether such provisions offend against those of the convention. Our response is in the negative for the reason that a default sentence of imprisonment is by its very nature not a direct sentence. Furthermore, an imposition of a sentence of a fine which cannot be enforced would be meaningless and could, therefore, not have been in the contemplation of the legislature, particularly in a case such as the instant one where no warrant of distress can effectively or meaningfully be levied against the convict, pursuant to section 297 of the Criminal Procedure Code, in the light of the order of forfeiture. In any event, the use of the term "may", as opposed to "shall", in Article 73(3) of the convention tends to suggest that the injunction prescribed thereunder is permissive.

As previously stated at the commencement of this judgment, the default sentence of imprisonment passed by the trial court was six months for each one of the five counts. This was the maximum sentence that could be imposed under section 295(1) of the Criminal Procedure Code the relevant parts of which are as follows:-

> *"**295(1)** The term imprisonment so ordered shall not exceed one day for each rupee of the total amount of the fine ... to which the offender has been sentenced. No sentence of imprisonment in default of payment of a fine ... shall exceed six months in all ..."*

It is noteworthy that the trial court did not impose the maximum fine of SR2,500,000: the sentence passed was a fine of SR250,000. In the circumstances, the maximum default sentence of 6 months imprisonment was unwarranted and a misdirection. To this extent, the appeal against sentence inevitably succeeds. Accordingly, the default sentence on each count is set aside; instead, a sentence of four months' imprisonment is substituted for each count. As before, these sentences are consecutive.

In the final analysis, and for the reasons given, the appeal against conviction is dismissed; but the appeal against sentence is allowed to the extent already indicated.

E.O. AYOOLA	A.M. SILUNGWE	G.P.S. DE SILVA
PRESIDENT	JUSTICE OF APPEAL	JUSTICE OF APPEAL

Dated this 3rd day of November 2000.