(2)

IN THE SEYCHELLES COURT OF APPEAL

CHERUBIN MORIN — ***FIRST APPELLANT***
DANIEL MORIN — ***SECOND APPELLANT***

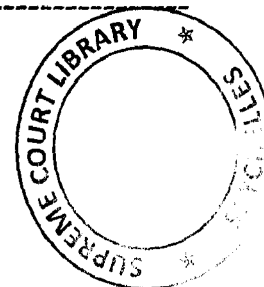
Versus

THE REPUBLIC — ***RESPONDENT***

SCA No. 11 of 02

***(Before:** Ayoola, P, Silungwe and Pillay, JJA)*

Mr B. Georges for the Appellants
Mr R.J. Govinden for the Respondent



JUDGMENT OF THE COURT

(Delivered by Silungwe, J)

The appellants were charged in the Magistrate's court with the crimes of causing grievous harm and damaging property, contrary to sections 221 and 325(1) of the Penal Code respectively, both read with section 23 of the Code. They pleaded not guilty on both counts but were, after trial, convicted as charged and each sentenced to two years' imprisonment on the first count and to a concurrent term of six months' imprisonment on the second one. Their appeal to the Supreme Court against conviction and sentence was unsuccessful on the first count but successful on the second one, resulting in the setting aside of both conviction and sentence on that count.

This appeal rests on three grounds as set out hereunder:

1. that the learned judge erred in his interpretation of the law relating to a citizen's arrest in that he placed a restrictive interpretation on

the right of a private citizen to arrest a person *"whom he reasonably suspects of having committed a felony"* and, as a result, his application of the facts to the law was flawed;

2. that the learned judge erred in upholding the conviction despite the material inconsistencies in the evidence of the two principal prosecution witnesses and erred in his finding that the inconsistencies were not sufficiently material to throw doubt on the prosecution case in that, as a result of the inconsistencies as to who had struck the blow, it was not open to the convicting magistrate to have found that both appellants had together assaulted the victim, or to the learned judge on appeal to have upheld the finding; and

3. that the sentences of immediate imprisonment for two years passed on each appellant are wrong in principle.

Mr Govinden, the learned Principal State counsel, has raised a *point in limine*, namely: that the entire appeal is incompetent as it is in conflict with section 326(1) of the Criminal Procedure Code which provides as follows:

> *"326(1) Any party to an appeal from the Magistrate's Court may appeal against the decision of the Supreme Court in its appellate jurisdiction to the Court of Appeal on a matter of law but not on a matter of fact or mixed fact and law or on the severity of sentence".*

Mr Georges properly concedes, on behalf of the appellants, that the second ground of appeal concerns mixed fact and law; as such, this ground is abandoned. Consequently, the appeal by the second appellant is now against sentence only.

It is maintained, however, that the first and third grounds both raise matters of law in that the former is about interpretation of the law relating to a citizen's arrest; and the latter concerns the imposition of an immediate sentence of imprisonment, as opposed to "*severity*" of sentence. He goes on to say that, in the circumstances of this case, the appellants could, for instance, have been sentenced to suspended or partially suspended terms of imprisonment, coupled with a compensation order, or they could have been fined.

Having heard, and given due consideration to, the learned counsel's argument on the *point in limine*, we are of the view that the contentious grounds, to wit; grounds 1 and 3, evidently do raise points of law (i.e. interpretation of law, and immediacy or direct sentence of imprisonment) and that they are thus in conformity with the provisions of section 326(1) of the Criminal Procedure Code. Accordingly, the 1st and 3rd grounds of appeal are both competent.

We will now consider the merits of the appeal but before doing so it is apposite to give a brief background to the case. Cherubin Morin and Daniel Morin (the first and second appellants, respectively) are father and son. On July 20, 2000, one Kenneth Laure (the complainant in this matter) allegedly accused the second appellant in Praslin of having given information to the

police about him and attempted to stab the second appellant with a knife (an allegation that was disputed) whereupon the latter telephoned the second appellant who was in Mahe about the incident. Four days later, and while the complainant was in the company of a companion, waiting to board a Mahe bound boat, the first appellant arrived from Mahe (met by the second appellant), and asked the complainant where the knife he had allegedly threatened to stab the second appellant with was. When the complainant replied that he had nothing to do with him and that he would meet him in court, the first appellant pulled and dragged him by his T-shirt (according to the complainant's version) and, as he did so, the second appellant punched him twice on the face. At the first appellant's invitation, the second appellant attempted to butt the complainant but the latter ducked, and as he did so, someone hit him with a knee on the nose thereby causing it to bleed. Whilst the complainant was being held by the first appellant, he was asked to accompany him to a police station but he declined to do so. Under cross-examination, the complainant testified as follows: "*If accused No. 1 had approached me nicely, I would have accompanied him to the police station*". Subsequently, the complainant travelled to Mahe where he received medical attention at Victoria Hospital. Dr. M Zaw who attended to him found that he had sustained "*a small fracture of the nasal bone*".

The first appellant's defence was essentially that he had been attempting to effect a citizen's arrest of the complainant and that the latter got injured in the course of resisting such arrest.

The learned trial magistrate accepted the prosecution case and rejected the first appellant's defence. In doing so, he expressed himself in these terms:

> *"I have to point out that a private person has no right to arrest a person as accused No.1 did in the circumstances of this case. He took the law into his hands by using force ...*
>
> *I do not feel that accused No. 1 really wanted to arrest PW8, even if he did not have the right to do so. In my view, he was influenced by a desire to punish PW8 himself for what he did to his son...*
>
> *I am ... satisfied that both of them together assaulted PW8 and caused him grievous harm...*

On appeal to the Supreme Court, Perera, J, having reviewed the material evidence before the court *a quo* and considered certain authorities, came to this conclusion:

> *"It is evident that when the learned Senior Magistrate stated that the 1st appellant had no right to arrest '<u>in the circumstances of this case</u>', given that he had taken the law into his own hands, he was guided by this interpretation of section 22(1). The conclusion cannot therefore be faulted and hence ground 2 (b) fails.*
>
> *Hence as the arrest was unlawful, any offence committed in furtherance of such arrest would also be unlawful".*

The first appellant's first ground of appeal impugns the foregoing conclusion. Mr Georges submits that throughout the first appellant's case, his defence was that he had been attempting to effect a citizen's arrest of the complainant and that it was while the complainant was resisting such arrest that he was injured. He further submits that a private citizen is allowed to arrest another by section 22(1) of the Criminal Procedure Code, inter alia, where he *reasonably suspects the person of having committed a felony.*

Section 22(1) of the Criminal Procedure Code provides:

"22(1) Any person may arrest any person who in his view commits a cognizable offence, or which he reasonably suspects of having committed a felony, or who has been named in a notice published under section 88".

In interpreting the section aforesaid, Perera, J, was of the view that the critical expressions of the section in the matter are *"who in his view"*, and *"when he reasonably suspects of having committed a felony"*. Mr. Georges asserted that the expression *"who in his view"* means *"who in his opinion"*. However, Perera, J, after considering an Indian case of *Thaning v. State of Kerala* (1965) KL T 697 (cited at p. 215 of Sehons *"The Code of Criminal Procedure 1973")* where it had been held that the words *"in his view"* meant *"in his presence"* or *"within sight of him"*, as opposed to *"in his opinion"*; the Indian Code of Criminal Procedure Act No. 2 of 1974; section 35 of the Code of Criminal Procedure of Sri Lanka; and section 24 of the Police and Criminal Evidence Act 1984 of England, held (and correctly so,

in our opinion) that on a proper interpretation, the words *"who in his view"* mean *"who in his presence"*. Mr Georges now acknowledges (and properly so) the correctness of this interpretation.

In regard to the interpretation to be placed on the phrase: *"whom he reasonably suspects of having committed a felony"*, he argues that the learned judge accepted that there had been a prior incident between the second appellant and the complainant, which the second appellant had brought to the first appellant's attention, and which, if believed by him, would constitute a felony under section 219(b) of the Penal Code and thus allow him to arrest the appellant on a reasonable suspicion of having committed a felony. This, continues Mr Georges, could have excused any injury thereafter caused to the complainant since the initial act would have been a lawful one. Further, Mr Georges submits that, likewise, this would have served to counter the case that both appellants had had a common intention in perpetrating the assault; and that placing a restrictive interpretation on the clear words of the statute is uncalled for.

The gist of Mr Govinden's response on this issue is that not only was the learned judge right in his interpretation of the law concerning a citizen's right of arrest, but also that the evidence does not support the defence of a "citizen's arrest".

Perera, J. held that it was necessary to put a strict interpretation on Section 22(1) of the Criminal Procedure Code in the light of Article 18 of the Constitution which guarantees the right to liberty and security of the person. He reasoned that an arrest *"under the second circumstance"* may

be effected when the arrestter reasonably suspects that the arrestee has committed a felony in his presence; but that an arrest based on suspicion which is dependent on information of an event that had occurred sometime before and elsewhere would not be lawful. He went on to say that, in the instant case, the first appellant had travelled from Mahe to Praslin on the strength of information of an event that had taken place four days previously and that, as such, he was not entitled to arrest the complainant.

In the view that we take, and for purposes of disposing of this matter, the critical issue is not whether the learned judge erred in his interpretation of Section 22(1) of the Criminal Procedure Code but rather whether there was cogent evidence to give rise to the defence of a citizen's right to arrest a person whom he reasonably suspects of having committed a felony in terms of the section aforesaid. It is only after facts have been ascertained that an application of the relevant law thereto is invoked. In other words, although the first ground is *prima facie* a matter of law, in substance, its relevance is predicated on the findings of fact made by the Magistrate which cannot be subject to appeal in this Court. As previously stated, the learned trial Magistrate believed the prosecution version and rejected the first appellant's defence, holding that the first appellant had been actuated by a desire to punish the complainant for what the latter had allegedly done to the second appellant. This was subsequently upheld by Perera, J.. In other words, the credible evidence did not disclose the defence advanced by the first appellant. In the premises, there was no factual basis to which Section 22(1) of the Criminal Procedure Code could be applied.

In the final analysis, therefore, the first ground fails because the so called defence cannot reasonably be sustained on the trial Court's factual findings. In any event, unreasonable force was clearly used in the matter.

It now remains for us to examine and determine the final ground of appeal which questions the propriety of the sentence imposed on both appellants. The sole issue for consideration and determination is whether, in the circumstances of this case, the imposition of an immediate or direct sentence of imprisonment was/is wrong in principle.

It is common cause that both appellants are first offenders; that the complainant suffered what the doctor described as a *"small nasal fructure"*; that the injury did not give rise to permanent disability; and that he was not hospitalised. In the circumstances, Mr. Georges implores the Court to accept his submission that, as a rule, a sentence of immediate imprisonment should not be passed unless there is no other appropriate punishement possible to meet the justice of the case. In support of his submission, he has placed before us a list of twenty five cases over the period 1998 and 2001, thirteen of which involve grievous harm with sentences ranging from fines, coupled with compensation orders; suspended sentences; and immediate prison terms. The cases that attracted immediate custodial sentences are three, namely:-

1. Roland Dorothe 896/98

   9 months' imprisonment (swollen cheek; black eyes; injury on back, shoulders, buttocks; and several abrasions; hospitalised for 8 days.

Magistrate described the accused's conduct as an act of barbarism);

2. Gary Clasisse 386/99

   18 months' imprisonment (fight – victim lost conciousness; fracture of nasal bone and hand; cut on wrist, arm and laceration on arm and hand compound fracture of metacarpal; injury to index finger; cut thumb; hospitalised; weapon: chain saw; permanent disability 15%; and

3. Terence Molle 594/2001

   One month imprisonment (Common law cohabittees; victim hit with flower pot; fracture of ulna plus wound; one month imprisonment).

Reference has been made to other cases as well, for instance, Sounders & Another v The Republic (1990) SLR30 in which Abban, CJ remarked at 36(e)–(f) that although the appellants merited custodial sentences, they did not merit immediate sentence of imprisonment.

The gist of Mr. Govinden's submission on sentence is that the Magistrate did not fall into error as there is no fixed sentencing pattern in this jurisdiction.

It is trite law that the appropriateness of a sentence is a matter for the discretion of a sentencer and that an appellate Court may interfere with such a sentence only on well recognized grounds, for example, where a sentence is wrong in principle. In our view, a sentencer should, in the absence of serious aggravating factors, be slow in sentencing a first offender to an immediate term of imprisonment if such offender can appropriately be dealt with in some other way. Of course much will defend on the facts and the gravity of each case.

In the present case, we consider in the circumstances that the sentences are wrong in principle, particularly since the trial Court did not have the benefit of the statistical data available before this Court.

For the reasons given, we make the following orders:-

1. the appeal by the first appellant against conviction on the first count is dismissed;

2. the appeal by both appellants against sentence is allowed with the result that their sentences are set aside. In substitution therefor, each appellant is sentenced to 12 months imprisonment with effect from October 7, 2002 when the original sentences were passed.

Dated this 11th *day of April 2003*