

Ragain v R
(2013) SLR 619

Domah, Fernando, Twomey JJA

6 December 2013

SCA 02/2012

Counsel A Juliette for the appellant

C Brown for the respondent

The judgment of the Court was delivered by

FERNANDO JA

[1] This was an appeal against the sentence of eight years imprisonment imposed by the trial Judge on the appellant, who pleaded guilty to the charge of manslaughter which was filed in addition to the charge of murder, almost at the conclusion of the prosecution case on 16 January 2012, after the evidence of all the eye-witnesses, investigating officers and the doctor had been placed before the Court. The original charge that was filed against the appellant was one of murder to which the appellant had pleaded not guilty and the trial of the appellant had proceeded on the charge of murder until 16 January 2012. As per the trial court brief we note that the last recording of prosecution witness testimony had been at 2.49 pm on 12 January 2012. According to the court brief it is recorded that the rest of the proceedings of that day had inadvertently not been recorded. On the next date, namely Friday 13 January 2012 on a joint application by counsel for the Republic and the appellant the case had been adjourned for the following Monday 16 January 2012 as counsel

had indicated that they had certain legal issues to be resolved between them.

[2] As per the proceedings of 16 January 2012 the Court had informed the jurors:

Learned Counsel for the prosecution filed an amended charge today bringing in a charge of manslaughter. The charge was put to the accused in the presence of his lawyer; the charge was brought as an alternative charge to the charge of murder [*as the copy of the charge handed over to Court during the hearing of the appeal by Counsel for the Respondent does not indicate that the charge of manslaughter was brought in as an alternative to the charge of murder, but rather as a second count*]. The accused pleaded guilty to the said charge of manslaughter and we proceeded to convict him and thereafter learned counsel for the accused made a submission in respect of mitigation and sentence was imposed on him. The sentence is read out to the jury. Jury is discharged.

[3] This proceeding is recorded after the appellant had tendered a guilty plea to the count of manslaughter, the plea in mitigation by counsel for the appellant, and the sentence had been read out in open court, in the absence of the jury. The proceedings of 16 January 2012 do not bear out the accused being charged on the basis of the second count or the accused himself pleading guilty to the second charge as required by law, other than what the trial Judge had told the jury as set out above. We do not even find on the court brief the second charge. Counsel for the prosecution on been notified of this shortcoming, produced before this Court prior to the hearing of this appeal a copy of an amended charge which he claimed the accused had pleaded to a second time on 16 January 2012. This charge

contains two counts, count 1 being murder and count 2, manslaughter. It is noted that the charge of manslaughter has not been filed as an alternative charge to that of murder.

[4] The single ground of appeal filed states that the sentence of eight years is harsh and excessive in all the circumstances of the case and is inconsistent and in disparity with other sentences for similar offences and the appellant seeks by way of relief to allow the appeal and reverse the sentence by reducing the sentence.

[5] Before we even consider the appeal, we find that there is an irregularity of procedure in the manner the plea to the charge of manslaughter had been taken. We find from the proceedings of 16 January 2012 as set out at paragraph 2 above, that the plea had been taken in the absence of the jury and the jury informed of the appellant's plea to the charge of manslaughter only after the appellant had been convicted on the basis of his plea and sentenced. This is contrary to accepted procedure for once an accused has been put in the charge of the jury a plea can be taken only in the presence of the jury and an accused person convicted on the basis of the plea only if the jury is prepared to accept the plea. Section 245 of the Criminal Procedure Code (CPC) states:

When the jurymen have been sworn or affirmed *the Registrar shall give the accused in charge of the jury by saying –*

Members of the jury, the accused stands charged by the name A.B. for that he, (reciting the words of the charge). *Upon this charge he has claimed to be tried. Your duty therefore is to hearken to the evidence and inquire whether he is guilty or not guilty.*

[Emphasis added]

[6] As per the oath a juror takes under s 243 of the CPC, he swears that he will well and truly try the matters at issue between the Republic and the prisoner at the bar, according to the evidence.

[7] The trial court brief indicates that all nine members of the jury had taken the oath and that the Deputy Registrar of the Court at the commencement of the trial had complied with the provisions of s 245 of the CPC by stating:

Members of the jury the accused stands charge by the name Leslie Ragain for that on the 19th day of March 2011 at Anse Louis Mahe Seychelles murdered Julianne Leon. Upon these charges [sic] he has claimed to be tried. Your duty is to hear the evidence and inquire whether he is guilty or not guilty.

[Emphasis added]

[8] It is the jury according to s 266 of the CPC that is entrusted with the task of deciding which view of the facts is correct and return a verdict which under such view ought, according to the direction of the judge, be returned and decide all questions which, according to law, are deemed to be questions of fact. Thus to take away from the jury the decision of a case that has been entrusted to them is contrary to the provisions of ss 245 and 266 of the CPC. It becomes more problematic when the accused's plea of guilt is to an offence lesser than the one the jury had been entrusted to try. There may be instances where a jury may be unwilling to accept a plea for manslaughter because they are of the view that the accused is guilty of murder or not guilty of any offence on the basis of the evidence already led.

[9] In trials by jury before the Supreme Court, according to s 235 of the Criminal Procedure Code the Supreme Court is permitted to accept a plea, before it empanels a jury. Section 235 of the CPC reads as follows:

(1) The charge shall then be read and if necessary explained or interpreted to the accused and the Registrar shall call upon him to plead thereto. If he pleads guilty the court shall hear his counsel *and if the court is satisfied that the accused understands the matter and intends to admit, without qualification, that he committed the offence charged and that the case does not involve any issue which ought to be tried, the court may convict him on his plea.*

(2) In any other event the court shall record the gist of the plea, or the fact that the prisoner does not plead, and a jury shall be formed. [Emphasis added]

[10] In *R v Hancock* [1931] 23 Cr App R 16; *R v Heyes* [1951] 1 KB 29, and *R v Rose* [1982] AC 822 it was held that where the defendant having initially pleaded not guilty subsequently changed his plea and the trial Judge proceeded to sentence without taking a verdict from the jury, the proceedings were held to be a nullity. In *R v Heyes*, Lord Goddard CJ said: “Once a prisoner is in charge of a jury, he can only be either convicted or discharged by the verdict of the jury”. *Archbold* (2012 ed) at paragraph 7-435 has submitted that in the case of a change of plea:

Notwithstanding *Poole* [referred to in paragraph 12 below], good practice should dictate that the rule in *Hancock* and *Heyes* should be followed (for the reasons given by Lord Diplock, and in the commentaries to *Poole* in Criminal Law Week

(CLW/01/45/6) and in the Criminal Law Review (2002) Crim LR 242).

[11] The gist of the judgment of this Court *In the Matter of: Reference by the Attorney-General under section 342A of the Criminal Procedure Code*, Cr App No 12 of 1999 was to the effect that the taking of a plea of guilty to manslaughter tendered by the defendant was improper.

[12] Counsel for the respondent submitted that there was no irregularity of procedure in the manner the plea to the charge of manslaughter had been taken and sought reliance on the cases of *R v Poole*[2002] 1 WLR 1528, and *R v McPeake* [2005] All ER (D) 349. In *Poole* the appellant faced charges of indecent assault and of supplying a class B controlled drug, to both of which the appellant had pleaded not guilty.

[13] After the commencement of the trial, she pleaded guilty to the charge of indecent assault in the presence of the jury. The plea had been accepted by the Crown, counsel explaining the reasons to the Judge and jury. Thereafter the Judge had discharged the jury after accepting the plea. Subsequently the appellant applied to vacate the plea of guilt on the basis that the trial was a nullity. At the hearing of the application for nullity the trial Judge came to the conclusion after hearing the evidence of the defendant that the defendant had fully understood her counsel's oral advice to her that she should only plead 'guilty' if she had committed the offence, that she had understood precisely what she was doing, and appreciated the significance of the document signed by her, before she pleaded guilty, which read:

I, L. R. Poole have decided of my own free will to plead guilty to count one in the indictment and I have made the decision after speaking with my advisers and

my partner ... I understand that I will be sentenced on the basis that I did the sexual acts complained of by C. I understand that I could well receive an immediate custodial sentence when sentenced for this offence

and had therefore dismissed the application. On appeal from this decision, the Court of Appeal had said that it was clear that:

this was a voluntary plea, entered by a defendant who understood exactly what she was doing, and the consequences, both in the sense that she was admitting that she was guilty, and also that she was at risk of a prison sentence.

[14] Thus in *Poole*, unlike in the instant case, the guilty plea had been taken in the presence of the jury and the reasons for accepting the plea had been explained by counsel for the Crown to the Judge and jury. Further there was evidence to show that the defendant had understood precisely what she was doing in pleading guilty and appreciated that she was at risk of a prison sentence. The position may have been different if a new indictment was filed with a charge of manslaughter, rather than adding the charge of manslaughter as count 2 to the existing indictment which continued to have the charge of murder as count 1 and which the jury had been called upon to determine.

[15] It is also to be noted that in Seychelles, unlike in the UK, it is only the offence of murder which is tried by the Supreme Court with a jury. The cases of *Poole* and *McPeake* relied on by counsel for the respondent are not of relevance to this case. On a perusal of the proceedings of the trial Court of 16 January 2012 pertaining to what the trial Judge told the jury after having accepted a plea of guilt for manslaughter as referred to at paragraph 2 above there is no way this

Court could come to a safe conclusion that the provisions of s 235 of the CPC had been complied with, namely that the Court was satisfied that the accused understood the matter and intended to admit, without qualification, that he committed the offence charged.

[16] According to the evidence of the main prosecution witnesses to the incident, namely the 10 and 14 year old daughters of the deceased, the deceased had returned home around 2 am on the morning of the incident after going to Bazaar Victoria and a party at 'Parti Lepep' at Maison Du Peuple. When the deceased tried to prepare milk for her 1 year old son she came to know that there was no electricity and blamed the appellant, an SPTC bus driver and her concubin of about six years, for having disconnected the electricity. The 1 year old child was by the appellant. The deceased had then called the appellant who had come in his bus and fixed the electricity, which had got disconnected apparently due to the breaker flipping. The deceased had then threatened the appellant not to come into the house and said she would take him to the police station if he came into the house. The appellant had then left the house saying "kiss me darling", and gone towards his bus that was parked outside. The deceased had then thrown a butter knife at the appellant. Thereafter the deceased had followed the appellant outside the house and thrown a stone at the bus which cracked the windscreen. She had been angry and swearing at the appellant. When the deceased was attempting to throw a second stone, the appellant had got out of the bus wrestled with the deceased and taken the stone from her hand and thrown it away. Thereafter he had got back into the bus to leave. The deceased had then started to walk hurriedly in front of the bus while the appellant had followed her in the bus. According to the 14 year old daughter the appellant had been driving slowly, while the 10 year old had stated "sometimes he would drive fast and sometimes he would

drive slowly”. At a certain bend of the road the appellant had swerved his bus to a side in the alley in order to proceed straight and at that point the deceased had collided with the bus and fallen down. When she fell the rear wheels of the bus had gone over the deceased. The appellant had then gone forward, parked his bus, come out and inquired as to “what has happened”. The appellant had then tried to resuscitate the deceased who was lying on the road and asked for assistance to put her in the bus. The appellant had been there until the ambulance and police arrived and left the scene only when some of the relatives of the deceased who had gathered there by that time, had become boisterous. Before reaching the alley the appellant had not tried to drive the bus onto the deceased. There is no clear evidence as to how the deceased came to collide with the bus or any evidence to the effect that the appellant had deliberately driven the bus on to the deceased or over her when she had fallen down. It is also in evidence that this was a narrow road and the bus was large. The road as per the testimony of another prosecution witness was almost the width of the bus. It had been the testimony of the 14 year old daughter of the deceased that when her mother was hit by the bus it was still dawn and there was insufficient light and thus not clear enough to see everything. The time as per the testimony of one witness was around 6.00 am, another 6.45 am.

[17] Added to the insufficiency of eye witness testimony as to how the incident took place we are hindered as a result of the absence of medical evidence on the appeal court brief as to the cause of death or the injuries suffered by the deceased, especially the internal injuries as a result of colliding with the bus. Although the prosecutor had indicated to the trial Court that a post mortem examination report would be tendered it had not been produced. The only medical evidence on record is from the doctor who had examined the deceased

when her body was taken to the Anse Boileau medical centre to the effect that the deceased had “multiple scratches on the body, like superficial wounds with cyanosis seen, nose bleeding and mouth bleeding with clot and an open fracture with deep laceration on the left leg.” At the hearing with reluctance we decided to look into the post mortem examination report pertaining to the deceased. We wish to state that in a case of murder in view of the provisions of s 235 of the CPC referred to at paragraph 9 above, before a plea could be accepted by Court or jury for the offence of murder or manslaughter, it is incumbent on the prosecution to place the facts pertaining to the crime and the medical evidence as regards the cause of death before the Court. It is only then we could conclude that the accused had pleaded guilty, having understood the matter and that he intended to admit without qualification that he committed the offence charged. One of the necessary elements that should be proved in respect of the offences of both murder and manslaughter is that the accused caused the death of the deceased. It is not a question whether this Court has been satisfied that there is material to indicate that it was the accused that caused the death of the deceased but whether the accused pleaded having been conscious of that fact.

[18] The evidence of the police officer, who photographed the crime scene and conducted an examination of the bus, does not help us to come to a conclusion as to how the deceased came by her death or injuries. According to her testimony she had not seen any human debris, skin, blood or anything under the bus when she examined it under a ramp. As a result of not having taken a measurement to see the clearance between the road and the bus from underneath the bus; and also the measurements of the body of the deceased who according to the photographs show a large bodied person; it is difficult to conclude from the evidence on record whether the bus in fact went

over the body of the deceased. The following dialogue between defence counsel and a witness is of relevance.

Q: ... Had you taken the measurement of the body and the measurement of the clearance of the bus, we would have been able to find out whether it was possible for the bus to actually have rolled on the deceased in the manner that is photographed. The whole bus over the deceased.

A: May be yes may be no.

Q: If we have a certain clearance under the bus, and the body happens to be bigger than that clearance under the bus, if the bus were on the body either the body will lift up the bus or the bus will crush the body. Do you agree?

A: It depends how the accident happened.

[19] A neighbour of the deceased who came on the scene soon after the incident had seen the appellant bending over the deceased who lay fallen on the road trying to revive her and to his question as to what happened to the deceased the appellant had answered “the deceased crossed in front of the bus, the bus has hit her and the wheel has gone over her.” To the ambulance driver who came on the scene after a phone call, the appellant had said on being questioned: “that the person just crossed in front of the bus and he could not avoid her.”

[20] Counsel for the respondent has provided to this Court attached to his letter dated 15 November 2013, a note of what the prosecution understand are the facts upon which the appellant was sentenced, that was given to the Court and taken from his note at the time. In this note he states:

Precisely what his intentions were in performing this manoeuvre the prosecution cannot say, but given that he knew she was there it was very dangerous. We do say he did not deliberately intend to hit her with the bus. But unfortunately he did. She was knocked down.

[21] The offence of manslaughter is defined in s 192 of the Penal Code as follows:

Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed 'manslaughter'. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

[22] Thus there are two main elements of this offence, namely an unlawful act or an unlawful omission and such unlawful act or unlawful omission should have caused the death of another person. Thus the causal connection between the unlawful act or unlawful omission and resulting death has to be established. Manslaughter by an unlawful act covers 'constructive' (unlawful act) manslaughter while manslaughter by an unlawful omission covers 'culpable negligence' manslaughter. Although these two types have their application to given sets of facts they do overlap to a certain extent.

[23] In order to prove constructive manslaughter there must be evidence to establish that the accused intentionally performed an 'act' and that 'act' is unlawful and that 'act' resulted in the death of a person. According to s10 of the Penal Code "... a person is not responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident." For an act to be 'unlawful' it should be dangerous to be treated as criminal.

In *Andrews v Director of Public Prosecutions* [1937] AC 576, the House of Lords held that only acts which are inherently criminal can form the basis of a constructive manslaughter charge. This is because certain acts are lawful if done properly, but unlawful if done dangerously or negligently, the most common example being, driving offences. It is an objective test that is applied to determine whether an act is dangerous:

Liability will be incurred for constructive manslaughter only if the act which causes death is criminal in itself, rather than becomes criminal simply because it is performed in a negligent and dangerous fashion. This point is particularly important in connection with deaths arising out of road traffic offences. If the criminality of an act could be provided merely by proof of negligence it would mean that anybody who killed another in the course of speeding, drink driving, or driving carelessly would be automatically guilty of manslaughter. (Professor William Wilson, Professor of Criminal Law at Queen Mary, University of London in his book *Criminal Law* (4 ed)).

[24] If however there is evidence to establish malice aforethought on the part of an accused who has been involved in a killing by knocking down a person with his vehicle he may be charged with the offence of murder.

[25] In order to prove gross negligence manslaughter there must be evidence to establish an omission; that omission should be unlawful; that omission should amount to culpable negligence to discharge a duty tending to the preservation of life or health; and as a result of such omission death has ensued. An omission arises as a

result of a breach of a duty of care. In cases of vehicular manslaughter it can be said that a duty tending to the preservation of life arises in respect of all those who can be foreseen as likely to be injured by one's careless actions or omissions.

[26] Section 206 of the Penal Code states:

It is the duty of every person who has in his charge or under his control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger; and he is held to have caused any consequences which result to the life or health of any person by reason off any omission to perform that duty.

[27] For there to be culpable negligence there should be gross negligence. In the case of *R vBateman*(1925) 19 Cr App R 8 it was held for there to be gross negligence manslaughter:

the negligence of the accused should have gone beyond a mere matter of compensation between subjects and showed such a disregard for the life and safety of others as to amount a crime against the State and conduct deserving punishment.

[28] This case on the basis of what we have stated at paragraphs 22 to 24 above is not one of constructive manslaughter, namely not one by an unlawful act. It is also difficult to conclude beyond a reasonable doubt that it is a case of gross negligence manslaughter, namely by an unlawful omission, for in view of the evidence as set out in paragraphs 16 and 19 above we find it difficult to conclude that

the element of ‘culpable negligence to discharge a duty tending to the preservation of life’ in s 192 are satisfied. Nor can we say that the appellant failed to use reasonable care and take reasonable precautions to avoid danger to the life, safety, or health of any person as set out in s 206 of the Penal Code.

[29] We also find that the amended charge upon which the appellant pleaded guilty to the offence of manslaughter, under the second count that was added to the indictment on 16 January 2012, and which was handed over to us by the counsel for the Republic at the hearing, does not in detail inform the appellant of the nature of the offence with which he was charged as required by art 19(2) of the Constitution.

[30] Article 19(2)(b) of the Constitution states: “Every person who is charged with an offence shall be informed ... in detail of the nature of the offence.” The added count 2 is as follows:

Statement of Offence

Manslaughter, contrary to section 192 of the Penal Code, punishable under section 195 of the Penal Code.

Particulars of Offence

Leslie Ragain on the 19th of March 2011 at Anse Louis, Mahe, unlawfully killed Julianne Leon.

[31] Our law of manslaughter as set out in paragraph 21 above and as explained in paragraph 22 above essentially creates two distinct types of manslaughter, namely constructive manslaughter (manslaughter by an unlawful act) and gross negligence manslaughter (manslaughter by an unlawful omission). We are conscious of the fact that the charge referred to at paragraph 30 above had been framed in

accordance with s 114(a)(iv) of the CPC which states that the forms set out in the Fourth Schedule to this Code “... shall be used in cases to which they are applicable...” and that nothing more than the particulars as required therein need be given. This provision has now to be read, subject to art 19(2)(b) of the Constitution. We are therefore of the view that in drafting a manslaughter charge it is necessary to state whether it is one of manslaughter by an unlawful act or manslaughter by an unlawful omission, unless the facts reveal that it is manslaughter by both an unlawful act and unlawful omission. Merely stating ‘unlawfully killed’ as stated in the charge is in our view, not in accordance with art 19(1)(b) of the Constitution. We also tend to think that had the charge been more specific all parties would have had a better understanding as to what the appellant was pleading to.

[32] This in our view is a unique case that has come up before us, for we find that the appellant has pleaded guilty to an offence he had not committed as result of a lack of proper understanding of the elements of the offence of manslaughter and the procedural law. We are constrained to think that this misconception as to the elements of the offence of manslaughter and the procedural law existed in the minds of the appellant, his counsel, prosecuting counsel and the trial Judge. It is clear from the note submitted to Court by counsel for the respondent as referred to at paragraph 20 above he erroneously treated this case as one of manslaughter by an unlawful act on the basis that that the appellant had driven the bus in a “very dangerous” manner. This is contrary to what we have stated at paragraph 23 above in relation to manslaughter by an unlawful act, especially vehicular manslaughter. We believe that appellant had found it necessary to blame the death of the deceased on himself out of remorse as she had been his concubine for a period of almost six

years and bore him a child. This is why we find in the plea in mitigation the defence counsel informing the Court that the accused is highly remorseful now and ever since the accident and that it was the intention of the appellant to plead guilty from the outset of this case. But what is puzzling us is the statement of the defence counsel: “As pointed out by the prosecution, there was no intent on his part to kill Julianne. *Accident happened* he had willingly and gracefully accepted.” [Emphasis added] Did the appellant thus plead guilty to an ‘accident’ which is exempt from criminal liability in view of the provisions of s 10 of the Penal Code?

[33] The difficulty we have in this case is that there is no formal written application before us as required by r 18 of the Seychelles Court of Appeal Rules 2005, to have the trial declared a nullity on the basis of non-compliance with the provisions of the CPC or any other basis. In the Australian case of *Gipp v R* (1988) HCA 21 it was held that:

the Court is not obliged to ignore a manifest miscarriage of justice demonstrated to it simply because the grounds to demonstrate it were not earlier raised. Any other rule would give priority to form over substance; it would permit procedural rules to defeat correction of a serious miscarriage of justice that has come to the notice of a court of justice.

[34] Article 19(1) of the Constitution states that every person charged with an offence has the right, unless the charge is withdrawn, to a fair hearing. We are of the view that the appellant in this case has not had a fair hearing in view of what has been stated at paragraph 28 above. Where there is a breach of this fundamental human right it is not possible to deny justice to him on the ground that there is a lack of

specific procedure. In the preamble to the Constitution the people of Seychelles have solemnly declared their unswaying commitment to uphold the rule of law based on the recognition of the fundamental human rights and freedoms enshrined in the Constitution. Article 19(1) guarantees a fair trial in the determination of a criminal charge and this autonomous concept has been interpreted in relation to art 6 of the European Convention on Human Rights in the case of *Eckle v FRG* (1983) 5 EHRR 1, to secure protection of the accused's rights throughout the period from the investigation to the conclusion of an appeal.

[35] We are of the view that our powers under r 31 of the Seychelles Court of Appeal Rules are something of a double-edged sword. On the one hand, we are obliged to ensure fairness in our proceedings; on the other we are permitted to cure defects under the proviso to r 31(5) and s 344 of the Criminal Procedure Code, thereby rendering the process as a whole fair. In *Ex parte Bennett* [1994] 1 AC 42 at 62, the House of Lords said:

English courts should not countenance behaviour that threatens either basic human rights or the rule of law, and this sentiment must apply with even greater vigour since the enactment of the Human Rights Act 1998.

[36] In short the legitimacy of the verdict should involve fundamental respect for the court process. The quality of proceedings and not merely their product are central to judicial legitimacy. R Dworkin in "A Matter of Principle" (1986) at 72 states:

The criminal justice system is not merely about convicting the guilty and ensuring the protection of the innocent from conviction. There is an additional and

onerous responsibility to maintain the moral integrity of the criminal process.

[37] This Court cannot ignore non-compliance with procedural requirements, especially s 235 of the Criminal Procedure Code and a plea of guilt based on a lack of understanding of the substantive law pertaining to the offence of manslaughter by the appellant, both counsel for the Republic and the appellant and the trial Judge. In *R v A (No 2)* [2002] 1 AC 45 (HL) Lord Steyn observed that it is well established that the right to a fair trial was absolute in the sense that a conviction obtained in breach of it cannot stand. According to *Archbold* (2012) at 7-46 the principle is the same as for defendants who plead not guilty. In *R v Lee* (1983) 79 Cr App R 108 the Court stressed that although a plea of guilty could not deprive the Court of jurisdiction to hear an appeal against conviction, it was highly relevant to the issue whether the conviction was unsafe that the appellant had been fit to plead, had known what he was doing, had intended to plead guilty and had done so without equivocation after receiving expert advice.

[38] There is no provision in the Seychelles Court of Appeal Rules 2005 which makes specific reference to interfering with a guilty plea where it has resulted in a “miscarriage of justice” and when there is no written application for the trial to be declared a nullity by the convict, save for the very wide powers the Court has while hearing an appeal under r 31 of the said Rules. Rule 31 provides that appeals to the Court shall be by way of re-hearing and the Court shall have all the powers of the Supreme Court including the power to draw inferences of fact and to give any judgment which the Supreme Court ought to have given or made. These powers may be exercised notwithstanding that the notice of appeal relates only to

part of the decision and such powers may be exercised in favour of any of the parties who have not appealed from or complained of the decision. In its judgment the Court may reverse the decision of the trial court as it may seem just. According to the proviso to r 31(5) the fundamental principle by which this Court is to be guided in hearing an appeal is to ensure that no substantial miscarriage of justice has occurred at the trial before the Supreme Court. It is emphasized that the miscarriage of justice should be a 'substantial', one which 'has actually occurred' and not one that is insubstantial or merely theoretical.

[39] When an appeal is lodged, the entire matter is before the court to which the appeal is brought and the court can entertain any matter, however arising, which shows that the decision of the court appealed from is erroneous. An appeal having been lodged, it is the duty of this Court to so hold, notwithstanding the limited nature of the grounds of appeal. In the Australian case of *Davies and Cody v The King* (1937) HCA 27 as quoted in *Gipp v R* (1988) HCA 21, it was held:

that the duty imposed on a court of appeal to quash a conviction when it thinks that on any ground there was a miscarriage of justice covers not only cases where there is affirmative reason to suppose the appellant is innocent, but also cases of quite another description. For it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has

been reached, the jury may have been mistaken or misled.

[40] In the case of *R v Cooper*(1969) 53 Cr App R 82 it was said that an appeal court:

must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it.

In this case there is more than a lurking doubt and a general feeling in our minds as to whether an injustice has been done.

[41] We are of the view that this case warrants us to act although there is no specific procedure or precedent in regard to exercise of such powers and as to whether we should declare the trial a nullity or quash the conviction based on the plea of guilt tendered by the appellant. We wish to stress that this will be a power that will be rarely exercised and only when there are valid grounds to do so, because of the mischief it could cause, the lack of certainty in plea deals and the need to ensure fairness to the victims and witnesses involved. A guilty plea in our view will be invalid where there is a misunderstanding on the part of the accused, his counsel, the prosecutor and the trial judge as to the nature of the offence; where the plea had been tendered purely out of remorse for the death of someone whom the accused thinks he is morally liable, where the charge had not set out in detail the nature of the offence committed, where on the admitted facts or the evidence led before the court, the accused could not have been convicted of the offence and there is

nothing on record to indicate that the trial judge had satisfied himself that the accused understood the nature of the offence and intended to admit, without qualification, that he committed the offence charged. *R v Forde* [1923] 2 KB 400 identified circumstances in which the Court of Appeal would interfere to set aside convictions where there had been pleas of guilty. Those circumstances were (1) that the appellant had not appreciated the nature of the charge, or did not intend to admit that he was guilty of it, or (2) upon the admitted facts the appellant could not in law have been convicted of the offence charged.

[42] In view of the circumstances detailed above under which the appellant had pleaded guilty to the offence of manslaughter in this case, we are strongly of the view that there was a serious irregularity of procedure in the manner the plea was accepted by the trial Court, leading to a denial of the right to a fair hearing, which makes the conviction unsafe. We therefore quash the conviction of the appellant and acquit him forthwith.