

IN THE SEYCHELLES COURT OF APPEAL

[Coram: A. Fernando (JA) , M. Twomey (JA) B. Renaud (JA)

Criminal Appeal SCA 8 & 9/2018

(Appeal from Supreme Court Decision CR 27/15

Godfrey Albert 1st Appellant

Terry Pointe 2nd Appellant

Versus

The Republic Respondent

Heard: 23 April 2019

Counsel: Nichol Gabriel for the Appellants

George Thatchett for the Republic

Delivered: 10 May 2019

JUDGMENT

M. Twomey (J.A)

Background to the Appeals

1. On 22nd July 2014, a housebreaking and theft was reported to the police by the British High Commissioner at her residence at Curio Road, Bel Air. Inspector Robin Omblime testified that he visited the scene and carried out a fingerprint examination. He lifted a palm print from a chest of drawers in a bedroom and later matched it to the First Appellant from finger and palm prints taken from him by Corporal Timothy Houareau. He stated that the print was fresh and not more than two weeks old. He also identified one of the stolen items, on one Marie-Paul Lesperance who was his ex-sister-in-law. He had questioned her about it and she told him she had got it from the 2nd Appellant.

2. Ms. Marie-Paule Lesperance confirmed that the necklace identified as the one stolen from the British High Commissioner's residence was sold to her for SR200 by the Second Appellant. Her brother-in-law informed her that the necklace was stolen, took it from her and handed it over to the police. She testified that she had met the Second Appellant at St. Louis and he had told her he had picked up the necklace at the Barrel Discotheque.
3. The security guard, Mr. Bonne, confirmed that the First Appellant had been working in the complainant's garden on the day of the incident.
4. Mr. Richard Skoll, the complainant's husband, testified that on 22nd July he had gone to bed at around 11 p.m. He recalled that his wife had closed the security grill and the door to the bedroom upstairs. She had placed her passport and some jewellery in a safe next to her bed. At around 4.45 a.m., he had awakened to see a hand disappearing through the curtains nearest to the security grill (Trellidor) in the bedroom. He had heard rustling and had called out to his son. He had heard more rustling and jumped out of bed and went to the bedroom window. The figure was small, about 5 feet 6 inches, 100 pounds in weight, with a yellow scarf round his head and only his eyes showing. He had on a red T-shirt and dark trousers. The intruder escaped. He shouted to the guard and phoned the police who arrived some fifteen to twenty minutes later.
5. Mr. Skoll later noticed that two heavy mattresses, usually propped up, behind the security grill had been moved to allow entry into the room. The safe was opened and ransacked, a large quantity of jewellery was missing and the handbag taken and then left on the balcony to the bedroom. Those having access to the house were his wife, son and mother-in-law. Both the cook and the housekeeper, Marie (also referred to as Wilhemine) had resigned a month earlier. The First Appellant had been working for them at the time of the incident and had a key to the back door of the house to access the house for water. He would not have had access to the bedroom or balcony area. The chest of drawers in the bedroom had a small jewellery box on top of it in which the keys to the safe were kept. The person who had opened the security grill also knew where the keys to the safe were kept. Mr. Skoll admitted that the housekeeper would ask for help to move the furniture

when she cleaned but this would be limited to the garden furniture or the living room for consular events. He stated that the chest of drawers had never been moved as the imprint on the carpet showed where it had always been.

6. The British High Commissioner, Mrs. Lindsay Skoll, corroborated her husband's evidence. She had locked the security grill and the bedroom door and put the keys to both on the chest of drawers before going to bed. She did not check the other security gate with the mattresses behind them as that gate was never unlocked.
7. After hearing shouting from her husband and the commotion, she had rung both the Chief Superintendent of Police and Minister Morgan and the police had arrived some ten minutes later. She confirmed her husband's testimony with regard to the safe being ransacked and the missing items. The First Appellant had come to work as usual but did not seem interested by her recounting the previous night's events. He was not sympathetic and smiled oddly. He had then begun to hose down the area outside the dining room where the green bin had been moved to get access to the roof. She found this suspicious, as it was not an area he would usually wash. He was told to stop.
8. She stated that although the First Appellant helped with the furniture in the garden and in the living room, he would have had no reason to go upstairs as this was a private area. He would help move furniture downstairs for an event at the Residence. He only had access to the kitchen for drinking water and to use the kettle.
9. The chest of drawers on which the imprint was found was a very heavy piece of Victorian furniture, which was never moved for cleaning or otherwise. When it was actually moved by the police after the break-in, it had a lot of dust behind it and also left the imprints on the carpet where it had been. If it had been moved previously it would have had a lot of prints on it as it would require many hands to grip it and then to move it.
10. The First Appellant testified that he was a gardener by profession and liked his job. He had worked at the British High Commissioner and other high profile persons' homes and there were no incidents of burglary at their houses. At the British High Commission,

apart from gardening, he would also polish silverware. He stated that he helped the housekeeper to move furniture.

11. Marie (Wilhemine), the housekeeper, testified that she had worked for fifteen years at the British High Commission. She knew the First Appellant who would help her move furniture when she needed to. He would move the mattresses, the chest of drawers and then put them back in exactly the same place to avoid marking the carpet. She stated that she was given permission to get the First Appellant to move the furniture upstairs. She stated that at first the British High Commissioner treated her well initially but not so later on. She admitted to being very bitter about it. She admitted that she had left the High Commissioner's employ a month before the incident happened but that two days before leaving she had asked the First Appellant to help her clean the balcony.
12. The First Appellant also relied on the statements of Jemina Tirant who had worked as a cleaner for the complainants at the time of the incident. It is her statement that the first Appellant never went upstairs and that she had not opened the doors near the safe or the curtain in the bedroom. She also stated that it was impossible to lift the chest of drawers as it was too heavy and she had never tried to move it or get assistance from anyone to move it. She also stated that she had never got the First Appellant to come upstairs to move any furniture. He would only assist in the dining room or living room downstairs.
13. The Second Appellant did not testify or call witnesses.

Conviction and Sentence of the Appellants before the Supreme Court.

14. Both Appellants in this case were convicted in the Supreme Court as follows:
 1. The First Appellant, Mr. Albert of aiding and abetting in housebreaking contrary to and punishable under section 289 (a) read with section 22 (c) of the Penal Code and stealing from dwelling house contrary to and punishable under section 264 (b) read with section 23 of the Penal Code.
 2. The Second Appellant Mr. Pointe of retaining property knowing or having reason to believe that the same to have been feloniously stolen, taken, obtained contrary to and punishable under section 309 (1) of the Penal Code (sic).

15. The First Appellant, a first offender, was sentenced to five years imprisonment for the offence of aiding and abetting in housebreaking and three years for stealing with the sentences to run concurrently.

16. The Second Appellant, a repeat offender, was sentenced to four years imprisonment to run consecutively to other terms of imprisonment already imposed on him in unrelated cases.

17. It is against these convictions and sentences that the following appeals have been filed and joined together for hearing before the Court of Appeal. With regard to the First Appellant, he has submitted the following grounds of appeal:

- 1.** The learned trial judge erred in convicting the Appellant on two counts namely aiding and abetting housebreaking and stealing from a dwelling house when the evidence adduced by the witnesses failed to support such a finding of guilt.
- 2.** The learned trial judge erred in convicting the Appellant on circumstantial evidence and failed to apply the proper test in his findings.
- 3.** The learned trial judge erred in convicting the Appellant on the evidence of fingerprints despite the fact that the Appellant and other witnesses had testified that he was employed at the High Commission at the time of the incident and his prints may have been left inside the premises.
- 4.** The sentence of five years on count 1 and three years on count 2 to run concurrently imposed by the learned trial judge is manifestly harsh, excessive, and wrong in principle especially for a first offender.

18. With regard to the Second Appellant, he has submitted the following grounds of appeal:

- 1.** The learned trial judge erred in convicting the Appellant for the offence of retaining stolen property despite the fact that the named stolen property was found in the possession of Marie-Paul Lesperance.
- 2.** The learned trial judge erred in convicting the Appellant despite having heard evidence that Marie-Paule Lesperance was initially charged with the offence but later became prosecution witness in dubious circumstances.
- 3.** The sentence of four years imprisonment by the learned trial judge is manifestly harsh, excessive and wrong in principle.
- 4.** The learned trial judge failed to take into consideration the young age of the

Appellant who was only 21 years old at the time of the commission of the offence.

The First Appellant’s submissions with regard to his grounds of appeal.

Ground 1 – the offence of aiding and abetting housebreaking

19. The First Appellant has submitted on this ground first, that he should have been charged with burglary and not housebreaking as the offence seems to have been committed in the night from the accounts given by the complainant and her husband. It must be noted that a charge of burglary carries a maximum sentence of fourteen years and that of housebreaking, one of ten years. Section 289 of the Penal Code distinguishes the offence of burglary from burglary as follows:

“Any person who-

(a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; ...

is guilty of a felony termed “housebreaking” and is liable to imprisonment for ten years.

If the offence is committed in the night, it is termed “burglary” and the offender is liable to imprisonment for fourteen years” (emphasis added).

Section 5 of the Penal Code defines “night” as:

“”night” or “night-time” means the interval between seven o’clock in the evening and half-past five o’clock in the morning.”

20. An information or charge is fundamentally defective if it does not disclose an offence as it exists under the law (*R v Valentin* (1976) SLR 35). Similarly, if a statement of offence is inaccurate, incomplete or otherwise deficient, it can be cured by the sufficiency of the evidence led by the prosecution (*Benoiton v R* (1996-1997) SCAR 69). Additionally, if the statement and particulars of an offence can be seen fairly to relate to a known

criminal offence but have been pleaded in terms which are inaccurate, incomplete or otherwise imperfect, conviction on that indictment can still be confirmed (*Jules v R* (2006-2007) SCAR 77). Moreover, the misstatement of an offence may be acceptable where it has not misled the appellant and has not caused a miscarriage of justice (*Rene v R* SCA 3/1999). Archbold, 38th Edition, para. 925 offers the meaning of that expression –

“A miscarriage of justice within the meaning of the proviso has occurred where by reason of a mistake, omission or irregularity in the trial the appellant has lost a chance of acquittal which was fairly open to him.”

21. Further, if there is an error in the charge, but that error does not create prejudice or embarrassment to the accused, then the conviction may not be quashed (*Vadivello v R* (1978) SLR 37; *Samson v R* (1995) SCAR 163).
22. It is clear from the above statutory provisions that the offence remains the same whether committed in the day or at night – a breaking and entering with intent to commit a felony - but if committed at night carries a greater penalty. In the circumstances, charging an accused with ‘housebreaking’ instead of ‘burglary’ does not render the charge defective. It is clear from the above authorities that no injustice was visited on the First Appellant by the charge of aiding and abetting housebreaking. If anything, he was charged with an offence of a much lesser penalty than that of burglary. In any case while he was charged with aiding and abetting the intruder who broke into the house during the night-time, the First Appellant’s acts were themselves committed in the day previous to the intruder breaking into the complainant’s house. There is no merit in this ground of appeal and it is dismissed.
23. Secondly, the First Appellant has taken issue with the fact that he was convicted of aiding and abetting in housebreaking. He submitted that there was no indication, that he “aided and abetted the burglar to break into the residence of the High Commissioner and no suspect was ever charged for the offence of burglary or housebreaking apart from himself”. It would appear from the Appellant’s reasoning that in order for a charge of aiding and abetting to succeed, the Court must necessarily find a principal offender who is identified and charged.

24. We beg to disagree. In this regard, section 114 (d) of the Criminal Procedure Code specifically provides that:

“The description or designation in a charge or an information of the accused person, or of any other person to whom reference is made therein, shall be such as is reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree or occupation; and if owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation, such description or designation shall be given as is reasonably practicable in the circumstances, or such person may be described as “a person unknown”” (emphasis added).

The provisions speak for themselves and require no additional comment from us. The ground of appeal has no merit and is dismissed.

Ground 2 – circumstantial evidence

25. In general, the offence of aiding and abetting an offence require the proof that another person committed a crime and that the person charged with the offence of aiding and abetting, assisted the crime's commission, whether by action or encouragement. In the present case, without doubt, there is enough evidence on the first limb of the offence to show that the complainant's house was broken into and several items stolen by a person.

26. In terms of the second component of the offence, we have addressed our mind to the evidence on record. The learned trial judge found that the First Appellant had ample opportunity to assist in the commission of the offence. He was alone at the house on 22nd July 2014 as the housekeeper had left and so had the complainant's mother to collect her son from school. His palm print was found on a chest of drawers in the complainant's bedroom, of which more will be said later in this judgment. He had, without instructions from the complainant, taken it upon himself to pressure hose the wall of the dining room where a bin had been moved to get access to the bedroom. He had behaved in a very odd manner subsequent to the break-in. He had also given contradictory evidence with respect to how his palm print was found on the chest of drawers in the balcony in that whereas he

had stated that he had often helped in moving furniture upstairs and this was corroborated by Marie, the previous housekeeper, it had been contradicted by the evidence of his own witness Jemina Tirant who stated that the First Appellant had never been allowed upstairs, let alone asked to move furniture there and that in any case the chest was too heavy for anyone to move. Further his witness who corroborated his narrative accepted that she was bitter with the complainant. It also seems extremely contrived and therefore incredible that she remembered the First Appellant being asked to move that specific chest of drawers two days before she stopped working for the High Commissioner.

27. The learned trial judge, the sovereign judge of facts in this case, who had the benefit of observing the witnesses chose to believe the prosecution witnesses and not the First Appellant and his witnesses. He drew inferences from the testimony of the prosecution witnesses and the contradictory nature of the First Appellant's evidence. We have no reason to second guess his judgment on this issue and therefore accept it. In any case the First Appellant's conviction was not grounded on just circumstantial evidence it was confirmed by direct evidence - the palm print evidence. This ground of appeal is therefore dismissed.

Ground 3- The palm print evidence

28. With regard to the discovery of the his palm print on the chest of drawers, the First Appellant has submitted that as he was a gardener at the complainant's residence and was asked to help move furniture from time to time, invariably his palm print would have been found on the furniture. First, as we have pointed out already, the other witness statement he tendered to corroborate his story, that of Jemina Tirant, contradicts his evidence. That witness stated that she never asked the First Appellant to move furniture upstairs and second that the chest of drawers was very heavy and was never moved. That narrative is certainly also corroborated by the complainant and her husband who described the chest of drawers as heavy Victorian furniture. It was dusty at the back when it eventually had to be moved for the police and there was only one set of imprints on the carpet where it had always stood. In any case they both also testified that the chest of

drawers, the mattresses, cardboard boxes and other items were just kept there as this area was used as storage. It was not cleaned and did not need dusting.

29. With regard to the issue relating to the expertise of Inspector Omblime, although this would have little bearing now with the finding that the First Appellant had never been allowed upstairs, we find it appropriate at this juncture to comment on the submissions made. It is the case for the First Appellant that it would have been impossible for the expert to conclude that the palm print was not older than two weeks. Obviously, if the print was older it would corroborate the First Appellant's narrative and that of his witness Marie, that he had been upstairs a month or so before to help move furniture around.
30. Counsel for the First Appellant was quick to indicate to the trial judge that he had no objection to the witness being treated as an expert when he started his testimony. That being the case he cannot now quarrel with the Inspector Omblime's findings especially in view of the fact that he did not bring another expert to challenge the evidence. The court is guided by the only expert evidence available; that is, that the prints developed quickly showing they were fresh and that that freshness was in the region of two weeks. Despite vigorous cross examination Inspector Omblime maintained his assertion. In the circumstances, unless controverting evidence was adduced, we are unable to find that the trial judge was wrong to rely on the only expert evidence available.

Ground 4 – the harshness of the sentence

31. The First Appellant has also submitted that the sentence imposed on him was too harsh especially given the fact that he was a first offender. We note that the penalties for the offences he was charged with (house breaking and stealing) are a maximum of ten years. He received five years for housebreaking and three years for stealing to run concurrently.
32. An aggravating circumstance in this case was the breach of trust between an employer and an employee. The learned trial judge referred to it prior to passing sentence. He also referred to the fact that valuable jewellery, many of which were heirlooms and irreplaceable were not recovered apart from only one necklace.

33. As has been submitted by learned counsel for the Respondent, a sentencing decision is only overturned when it is wrong in principle or is manifestly excessive. An appellate court cannot interfere with the discretion of a court of first instance merely on the ground that the appellate court would have reached a different decision. No principle of sentencing was breached by the trial judge and the sentence was not at all harsh given the aggravating circumstances. We therefore decline to interfere in the sentencing decision of the trial judge and dismiss this ground of appeal.

The Second Appellant's appeal

Grounds 1 and 2 – the conviction for retaining stolen property when the property was found.

34. It is the Second Appellant's submission that his conviction was wrong as the charge against him for retention of stolen property was defective given the fact that the property in issue was found with a third party.

35. Section 309 of the Penal Code provides in relevant part:

“309. (1) Any person who receives or retains any chattel, money, valuable security or other property whatsoever, knowing or having reason to believe the same to have been feloniously stolen, taken, extorted, obtained or disposed of, is guilty of a felony, and is liable to imprisonment for fourteen years...”

36. It is clear from these provisions that in order to secure a conviction for receiving or retaining stolen property, it must be proved that the property in question was stolen; that it was received or retained with the knowledge that it was stolen or unlawfully obtained; and that the stolen property was in the possession of the accused (See *Poris v R* (1987) SLR 45.

37. The Skolls testified that the necklace which was recovered was the one stolen from their residence. Marie-Paule Lesperance testified that she was informed by the 2nd Appellant that he had picked up the necklace from the Barrel Discotheque and had sold it to her for SR200. He had also told her not to wear it immediately as he didn't know to whom it

belonged. Yet in his statement he denied going to the Barrel Discotheque for about a year and half. He had no comment to make about the necklace. In these circumstances the trial judge was entitled to draw the inferences he did.

38. Further, the fact that Marie Paule Lesperance who was initially charged with the offence and then turned state witness was related by marriage to Inspector Omblime does not exonerate the Second Appellant in any way. She was also related to the Second Appellant and another witness in this case. No adverse inference can be drawn from such familial relationships, especially in Seychelles which is a small community with invariable family ties.

39. These grounds of appeal have no merit and are dismissed.

Grounds 3 and 4 - harshness of the sentence.

40. Learned Counsel for the Second Appellant has submitted that given the young age (21) of the Second Appellant at the time of the commission of the offence, the sentence passed by the trial judge was manifestly harsh, excessive and wrong in principle.

41. The sentence passed on the Second Appellant was four years. The maximum sentence for receiving or retaining property is fourteen years. Counsel has not demonstrated to us why the sentence is manifestly harsh and excessive given that the Second Appellant is an habitual offender with a string of past convictions for similar offences. There is absolutely no merit in this ground of appeal and is dismissed.

42. The appeals of both appellants are in the circumstances dismissed in their entirety.

M. Twomey (JA)

I concur:

A. Fernando (JA)

I concur.

B. Renaud JA

Signed, dated and delivered at Palais de Justice, Ile du Port on 10 May 2019