

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2020] SCCA
SCA CR 14/2019
(Appeal from Cr. App. 49/2016)
(Arising from appeal from
Magistrates' Court CR99/2013)

Michel Ah-Time
(rep. by Mr. Divino Sabino)

Appellant

and

The Republic
(rep. by Mr. Ananth Subramaniam)

Respondent

Neutral Citation: *Ah-Time v R* (SCA CR 14/2019) [2020] (SCCA) – 18 December 2020.

Before: Fernando, President, Robinson JA and Tibatemwa-Ekirikubinza JA

Summary: This was an appeal against the judgment of the Supreme Court on appeal from a judgment of the Magistrates' Court against the conviction of the Appellant for unlawful possession of marine shells and the forfeiture of coco de mer nuts and kernels.

Heard: 1 December 2020

Delivered: 18 December 2020

ORDER

Appeal against the conviction for unlawful possession of marine shells and the forfeiture order made in relation to the seized coco de mer nuts and kernels is dismissed.

JUDGMENT

FERNANDO, PRESIDENT

1. The Appellant has appealed against the judgment of the Supreme Court, given on appeal against the judgment of the Magistrate's Court, whereby the Appellant's conviction for possession of 1340.9 kg of marine shells without a permit contrary to section 11(7) of

the Fisheries Act was upheld. There is no appeal against the fine of Rs 6000/- the Supreme Court had ordered by way of sentence, reducing the fine of Rs 10,000/- imposed by the learned Magistrate. The Appellant has also appealed against the order of the Supreme Court “allowing the forfeiture orders (with conditions for release) vis a vis the coco de mer shells and kernels”.

2. The Appellant had been charged before the Magistrates Court in case No 99 of 13 on three counts; namely count (1), being in possession of 109 mature coco de mer nuts without an approved label affixed to them contrary to the Coco De Mer (Management) Decree; count (2), for possession of 1340.9 kg of marine shells without a permit granted by the Seychelles Fishing Authority contrary to the Fisheries Act; and count (3), possession of 448.3 unworked hawksbill turtle shell without a permit granted by the Seychelles Fishing Authority contrary to the Fisheries Act. By his Ruling on a Submission of No Case dated 30 September 2013, the learned Magistrate had acquitted the Appellant on count (3). In respect of count (1) the learned Magistrate had said that the prosecution has failed to prove one of the necessary ingredients of the said count, but found the Appellant to be in unlawful possession of 109 mature coco de mer nuts for the purpose of doing business and ordered the Appellant to give “a satisfactory account to the court of how he came by the same and/or to furnish the necessary approved labels as required under the Coco De Mer (Management) Decree 1994 for each whole mature nut or part thereof.” The learned Magistrate in his judgment dated 12 the December 2016 had stated that although initially the accused was charged with 3 different sets of offences it was ruled that the Appellant had a case to answer only in respect of the charge pertaining to possession of 1340.9 kg of marine shells without a permit contrary the Fisheries Act. The learned Magistrate had convicted the Appellant only of count (2), namely possession of 1340.9 kg of marine shells without a permit contrary the Fisheries Act. This is borne out also in the Sentencing Order of 23rd January 2017 where the learned Magistrate had said that the Appellant has been acquitted of counts (1) and (3). The learned Magistrate had sentenced the Appellant to “pay a fine of SR 10,000/-, payable by end of April 2017 or in default 2 months imprisonment”. In relation to the exhibits relating count (1), of which the Appellant had been acquitted the learned Magistrate had ordered in his Sentencing Order that “all the coco de mer nuts... be forfeited to the State and may be disposed of as deemed appropriate, unless the accused (*Appellant*) can satisfy the Department responsible for the management of the coco de mer nuts, within a period of 4 weeks that he was in lawful possession of those nuts, in that he had the approved labels for them”. In relation to the exhibits relating count (3), of which the Appellant had been acquitted the learned Magistrate had ordered in his Sentencing Order that “all the unworked turtle shells are forfeited to the State and may be disposed of as deemed appropriate.”

3. The Appellant had appealed both against his conviction and the forfeiture order made in relation to the coco de mer nuts by the learned Magistrate to the Supreme Court. There had been no appeal against the forfeiture order made in relation to the unworked turtle shells.
4. The Appellant has raised the following grounds of appeal against the conviction for possession of 1340.9 kg of marine shells without a permit contrary to section 11(7) of the Fisheries Act:
 - i. “The Learned Judge erred in stating that the amount of marine shells stated on the Particulars of offence was irrelevant with respect to conviction.
 - ii. The Learned Judge erred in taking the position that the Particulars of Offence charged the Appellant with being in possession of only 20kg of marine shells.
 - iii. The Learned Judge erred in concluding that witnesses had identified that there were 1340.9 kg of marine shells.” (verbatim)
5. Count 2 of the charge laid before the Magistrates’ Court against the Appellant was as follows:

“Statement of Offence

Possession of excessive quantity of shells without a permit contrary to section 11(7) of the Fisheries Act and punishable under section 26 of the same Act.

Particulars of Offence

Michel Ah-Time of Vista Do Mar, glacis, Mahe, on the 22nd day of September 2011, was in possession of 1340.9 kg of marine shells without a permit granted by the Seychelles Fishing Authority which exceeds the 20 kg of shells permitted by the Seychelles Fishing Authority.”

It must be stated that the above charge is defective as the offence the Appellant was charged with is set out not in the Fisheries Act but in the Fisheries Regulations of 31 March 1987. Further the way the offence has been particularized gives the impression that only 20 kg of shells are permitted by the Seychelles Fishing Authority. What regulation 11(7) of the Fisheries Regulations of 31 March 1987 states is: “*No person shall possess more than 20 kilogrammes of shells except pursuant to a permit granted by the SFA.*” The Appellant has not taken any objection to the charge nor raised it as a ground of appeal.

9. Ground (iii) of appeal is essentially ‘on a matter of fact’, and thus not an appealable matter in view of the provisions of section 326(1) of the Criminal Procedure Code and I therefore dismiss the said ground of appeal. Section 326(1) states:

“Any party to an appeal from the Magistrates’ 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 severity of sentence”.

10. As regards ground (ii) of appeal, nowhere in the judgment had the Learned Judge “taken the position that the Particulars of Offence charged the Appellant with being in possession of only 20kg of marine shells.” I therefore dismiss ground (ii) of appeal.
11. As regards ground (i) of appeal the Learned Judge had not stated anywhere in his judgment that “the amount of marine shells stated on the Particulars of offence was irrelevant with respect to conviction.”
12. The learned Supreme Court Judge had stated at paragraph 4 of his judgment “...the fact remained that the Appellant still did not have the necessary licenses to cover 1340.9 kg of shells. At the most the licenses he had might cover only 594.15 kg for which he provided two documents leaving 756. 75 kg outstanding and not covered by any permit...The Learned Judge had then at paragraph 5 of his judgment made reference to regulation 7(11) which states: “*No person shall possess more than 20 kilogrammes of shells except pursuant to a permit granted by the SFA.*”. He had then gone on to state “The offence is committed when the person exceeds the allowable 20kg of shells in his possession...If the person has more than the license allowed, in this case more than 594.9 kg the person commits an offence not only for the kilograms in excess of the permit but for exceeding the allowable or licensed amount. The law does not require any calculations to be made in that respect and in any event the weight does not have any bearing on the offence except in so far as it exceeds the allowable or permitted amount.” The above statements of the learned Supreme Court Judge show that he had not been misled by the particularisation of the offence and determined the case correctly on the basis of regulation 7 (11) and thus no prejudice has been caused to the Appellant by the incorrect particularisation of the offence. I am also in agreement with the reasoning of the learned Supreme Court Judge in upholding the conviction of the Appellant under count 2. The fact that the Appellant had been charged with possession of 1340.9 kg of marine shells without a permit granted by the Seychelles Fishing Authority, instead of 756.75 kg of marine shells would not have prejudiced the Appellant but only may have a bearing on the sentence to be imposed. I therefore dismiss ground (i) of appeal. The

Learned Supreme Court Judge had reduced the fine of Rs 10,000/- to Rs 6,000-. There is also no appeal against the fine of Rs 6,000/- imposed on the Appellant.

13. The Appellant has raised the following grounds of appeal against the forfeiture order made in relation to the coco de mer nuts and kernels:

- i. “The learned Judge erred in allowing forfeiture orders (with conditions for release) vis a vis the coco de mer nuts and kernels despite there being no related convictions.
- ii. The learned Judge erred in failing to establish how proof of ownership should be determined in order to secure release of the coco de mer nuts and kernels.
- iii. The learned Judge erred in failing to direct or specify how the coco de mer nuts and kernels should be released to the Appellant.” (verbatim)

14. **The Coco-De- Mer (Management Decree)** has the following provisions:

Section 13: “It shall not be lawful for any person other than the holder of a licence to carry on the business of dealing in mature nuts.”

Section 21 “... no mature nuts shall be removed from any place in Seychelles to another without being accompanied by a permit.”

Section 31: “It shall be lawful for-

- (a) ...
- (b) any member of the police force ...to call upon any person having in his possession, or who shall be found anywhere carrying or conveying any mature nuts to produce the permit required by this Decree in respect of such mature nuts or to account for his possession of such mature nuts and, if such person neglects or refuses to produce such permit or if such member of the police force has reasonable cause to suspect that any mature nuts found in possession of or being carried or conveyed by such person, has been stolen or unlawfully obtained, such member of the police force may arrest such person without a warrant:

Section 35: “Any person who shall remove or cause to be removed from any place, any mature nuts without the permit required by this Decree and any person receiving or found under any of the circumstances mentioned in paragraph (a) or paragraph (b) of section 31 in possession of mature nuts, without the same being accompanied by permit in strict conformity with the provisions of this Decree or who shall fail to produce such permit when bound under section 31 so to do, shall be guilty of an offence...”

Section 36: “No person shall deal in mature nuts unless he is a registered producer or a licensed dealer.”

Section 40: “Any licensed dealer who:

*(a) has in his possession a mature nut which does not have an approved label affixed;
shall be guilty of an offence...”*

The above provisions make it clear that unlawful possession of coco de mer nuts is an offence.

Section 155 of the Criminal Procedure Code dealing with property found on an accused person states:

“Where, upon the apprehension of a person charged with an offence, any property is taken from him, the court before which he is charged may order-

(a) that the property or a part thereof be restored to the person who appears to the court to be entitled thereto, and, if he be the person charged, that it be restored either to him or to such other person as he may direct; or...”

15. The learned Supreme Court Judge had said: “In respect of the forfeiture orders, in usual circumstances, when a person is acquitted of an offence, items or exhibits which were seized from that person would be returned to that person where lawful ownership is not in contention. However, where there is a requirement to demonstrate lawful ownership or possession of a thing through valid document, such return may not be as a matter of course but rather upon proof of lawful possession or ownership. In this case, the law requires documentary proof of ownership of coco de mer nuts and kernels. I find that the learned Magistrate did in fact give the Appellant 4 weeks to produce his documents of entitlement to the coco de mer nuts. It appears that the Appellant failed to produce the same as the matter is still in contention on appeal. The Appellant was nevertheless given the opportunity to make representations establishing his right to possess the said items. I find that it was not necessary for the learned Magistrate to have done more or to require an application for forfeiture...” The learned Supreme Court Judge was correct in what he had said and I agree with him. I therefore dismiss grounds (i) and (ii) of appeal against the forfeiture of the coco de mer nuts.

16. In the case of **A.S.S. Ahmed Sahib V Commissioner of Police, 1970 Cri L J 1016**, the Madras High Court held: “Normally in cases where the offence is not made out, the property should be delivered to the person from whom it is seized or taken. But it will depend upon the circumstances of each case. In such cases, the actual possession of the

property at the time it was seized may be a relevant factor but not conclusive to determine the entitlement of such possession. The words used in section 523(1) of the Indian CPC 1898 are the ‘person entitled to the possession of the property’. These words cannot be equated with actual possession. Nor can they be equated with the expression ‘the person from whom the property is seized or taken’. A person may be in unlawful possession at the time it was seized though he has not committed the offence, and in that circumstance, it cannot be said he is entitled to possession. It must be a lawful possession. The test therefore, is not the mere possession of property at the time of seizure, but as to who is entitled to lawful possession...” The wording in section 155 of the Criminal Procedure Code of Seychelles, namely ‘the person entitled to the property’ is identical to section 523 (1) of the Indian CPC 1898. In the case of **Nand Lal V State of Rajasthan and another, 1986 (1) WLN 18**, the Rajasthan High Court interpreting section 457 of the Indian CPC, held that a person who had acquired seized property by “dishonest means” would not be entitled to its possession even though no offence was subsequently made out against him. In the case of **Oon Heng Lye V Public Prosecutor, [2017] SGHC 236** the High Court of the Republic of Singapore held “*I did not think that Oon was the person entitled to the possession of the seized funds. This was because I found, as submitted by the Prosecution, that a person could only be ‘entitled to the possession’ of seized property under section 392 of the CPC 1985 if he satisfies the precondition of being in lawful possession of the seized property... the person from whom the property is seized is not automatically assumed to be entitled to possession; he must nonetheless demonstrate that the seized property was “legally acquired by him. Simply put, it would be wrong to assume that the person from whom the property is seized is in lawful possession simply because that person is not convicted of any offence.”*

17. The learned Supreme Court Judge had gone to the extent of stating: “In respect of the coco de mer nuts and kernels...the Appellant must show proof of lawful possession as required by law failing which these items would be forfeited to the Republic. I maintain the period of 4 weeks from the date of this judgment as reasonable period for the Appellant to do that...” I believe that the learned Supreme Court Judge had been too gracious in affording the Appellant further time to show proof of lawful possession of the coco de mer nuts and kernels as required by law by extending the time period set by the learned Magistrate. It is now almost 3 years and 10 months since the learned Magistrate had ordered in his Sentencing Order of 27th January 2017, that “all the coco de mer nuts... be forfeited to the State and may be disposed of as deemed appropriate, unless the accused (*Appellant*) can satisfy the Department responsible for the management of the coco de mer nuts, within a period of 4 weeks that he was in lawful possession of those nuts, in that he had the approved labels for them”. Up to date the

Appellant has not come up with proof of lawful possession of the coco de mer nuts and kernels as required by law. I am not prepared to give any further time.

18. In respect of ground (iii) of appeal against the forfeiture I wish to state that it is not the function of the Courts to direct or specify how the coco de mer nuts and kernels should be released to the Appellant. If the Department responsible for the management of the coco de mer nuts had refused to release the coco de mer nuts and kernels as argued by the Counsel for the Appellant at the hearing before us, despite the Appellant satisfying the Department that he was in lawful possession of those nuts, in that he had the approved labels for them, it was left for the Appellant to take appropriate action by seeking a writ of mandamus.
19. I therefore dismiss the appeal of the Appellant against his conviction for unlawful possession of marine shells. I dismiss the appeal against the forfeiture order made in relation to the seized coco de mer nuts and kernels.

Signed, dated and delivered at Ile du Port on 18 December 2020

Fernando, President

I concur

Robinson JA



I concur

Tibatemwa-Ekirikubinza JA