

**Republic v Bamboche
(2000) SLR 1**

Wilby Lucas for the Republic
Franky Simeon for the respondent

Judgment delivered on 13 June 2000 by:

PERERA J: This is an application for a revision of sentence filed by the Attorney General in terms of section 328 of the Criminal Procedure Code (Cap 54).

Particulars of offence are as follows:

The respondent was charged before the Magistrates' Court with the offence of housebreaking, contrary to section 289 (a) of the Penal Code and stealing, contrary to section 260 of the Penal Code. According to the particulars of the offence, the items stolen from the dwelling house were one video cassette player and three "red snapper" fish, together valued at R3100.

After the learned Magistrate had explained the right of legal representation to the accused, he elected to defend himself and also pleaded guilty to the charges. In sentencing the respondent, the learned Magistrate made the following order:

I have considered the fact that the accused is a first offender, he has pleaded guilty at the first instance, and the facts contemplated in his plea of mitigation. At present the law prescribes a minimum mandatory sentence of 5 years for count 1.

I therefore sentence him as follows:

Count 1: 5 years imprisonment
Count 2: 2 years imprisonment
Both to run concurrently.

The part of the order sought to be revised is the finding of the learned Magistrate that the present law prescribes a minimum mandatory sentence of 5 years for the offence of housebreaking.

The present law as regards sentencing for the offence of housebreaking and burglary under section 289 of the Penal Code is contained in the Penal Code (Amendment) Act 1995, (S.I. 16 of 1995). By section 27A(l)(a) and(e), the previous term of 7 years imprisonment was increased to 10 years. By Section 27A(l)(b), it is provided that where an offence is punishable with imprisonment for more than 8 years, but not more than 10 years, and the person has, within 5 years prior to the date of conviction, been convicted of the same or similar offence, be sentenced for a period of not less than 5 years.

Hence the mandatory term of 5 years applies to a second or subsequent offender and not to a first offender, such as the convict in this case.

Therefore, the learned Magistrate had the discretion to impose any custodial sentence up to 10 years by virtue of the amendment in section 27A(l)(a) (e) aforesaid, or to a non-custodial sentence involving a fine or a suspended sentence.

In terms of section 329(l)(b) and (c) of the Criminal Procedure Code, this court, in exercising powers of revision, is empowered to make any order which it could have made in exercising its appellate jurisdiction. In any event, the convict has filed an appeal against the sentence (appeal 4 of 2000), which was taken up together with the revision application filed by the Attorney General. It was agreed by Counsel that the decision in the revision application would dispose of the grounds relied on in the appeal as well.

The prosecutor who appeared before the Magistrates' Court had not stated the facts and circumstances of the offence to the learned Magistrate as is usually done when an accused pleads guilty. The Practice Direction No. 1 of 1971 dated 20 August 1971 (1970-1971 SLR 1) is as follows:

To enable:

(a) the Magistrates' Court to decide upon the proper sentence to be passed, and

(b) the Supreme Court on appeal or revision to decide upon the propriety of a sentence passed by the Magistrates' Court, the following directions are issued by the Chief Justice for the guidance of Magistrates when dealing with a case where the accused person pleads guilty to the charge against him.

1. Before convicting the accused person as required by section 81(2) of the Criminal Procedure Code, the Magistrate shall invite the prosecution to state the facts and circumstances to the offence, the substance of which shall be noted down briefly on the record, and the accused person shall then be asked whether he admits all or any of them. The substance of what the accused person states in reply shall also be noted down briefly. (This procedure will enable the Magistrate to satisfy himself as to whether the accused person understands the charge laid against him, to which he pleads guilty, and at the same time to ascertain the facts and circumstances which he admits.

However, in the present case, only the following had been recorded as "facts".

Magistrate: As per charge. The video cassette player was recovered. 1 red snapper was recovered.

Accused: I admit the facts.

Magistrate: On the accused's plea of guilty and admission of facts, I proceed to find the accused guilty on both counts and proceed to convict him on both counts.

As this court in exercising the reversionary powers or appellate powers could not decide on the propriety of the sentence passed, counsel for the respondent was called upon to state the facts admitted and any mitigating factors which the respondent, who was inops concilii before the Magistrates' Court, had failed to submit to that court. The following facts were disclosed by counsel for the respondent with the Counsel for the Republic agreeing.

The convict had worked for Frank Savy, the virtual complainant, on a casual basis. The convict claimed R2000 as his wages but Savy had failed to pay. Consequently there was a dispute regarding the wages. The convict has a wife and children to support. His wife is presently expecting another child. Hence failing to get his wages, he entered the house of Savy by force opening the back door. He removed three "snapper" fish from the refrigerator, and also took the V.C.R from the sitting room. The house was unoccupied at that time. Mr Simeon submitted that although the offence of housebreaking and theft have been committed, those offences had been committed due to anger and the financial necessity to maintain his family.

Thomas on *Principles of Sentencing* (2nd Edition) states at page 207:

Offences, usually of dishonesty, are frequently attributed to the fact that the offender found himself in a financial crisis to which misappropriation appeared to be the only solution. Where the offender's financial embarrassment is the result primarily of events beyond his control rather than extravagance or gambling, these circumstances may have some mitigating effect.

The respondent, in mitigation before the Magistrates' Court stated "I am guilty, I should not have done this",... "I ask the court to forgive me". When the present revision application was taken up for hearing, the convict, who was then not legally represented told this court "I did what I did out of anger because I worked for a whole month and I was not paid".

However, criminal law does not take into account the motive of an offender, but his intention. Hence a good motive will not excuse an otherwise unlawful act. A person who steals a loaf of bread to feed his hungry children is still a thief as his mens rea was to steal, although his motive was good. However, a sentencer would be more lenient to him than to a thief in other circumstances. So also in the present case, the items

selected by the convict indicate that his motive was to compensate himself for the wages he had earned, in kind, as the cash was not forthcoming from his employer. There were other legal ways of recovering his wages, and the convict himself had told the Magistrate in mitigation "I should not have done this". But repentance comes too late.

Under section 329(l)(b) and (c) of the Criminal Procedure Code, this court in exercising the powers of revision, is empowered to make any order which it could make in exercising its appellate jurisdiction. An appellate court does not interfere with the sentence passed by a subordinate court, except in the following circumstances:

- (1) Where the sentence is not justified by law, in which case the court will interfere not as a matter of discretion, but of law.
- (2) Where the sentence has been passed on wrong factual basis.
- (3) Where some matter has been improperly taken into account or there is some fresh matter to be taken into account.
- (4) Where the sentence was wrong in principle, or manifestly excessive.

In the present case, it is manifest that the learned Magistrate imposed a sentence of 5 years imprisonment considering himself bound to impose a mandatory sentence. That sentence was therefore wrong in principle, and not justified in law.

There are several mitigating factors to be considered in this case:

1. The accused was a first offender.
2. He was entitled to the benefit of a Social Inquiry Report before sentencing. That was not done.
3. He pleaded guilty at the first instance and saved the time of the court.
4. The items stolen have been voluntarily returned by the convict. Hence he did not benefit from the crime.
5. His family circumstances.
6. The chances of his repeating this offence is minimal.

What then is the suitable punishment in this case?

In the case of *R v Law* (Current Sentencing Practice - Vol 1 - Section (3-2 B01), a sentence of 3 years imprisonment for arson was reduced to 18 months' imprisonment on the ground that the offence was the result of emotional stress. In that case, the accused had set fire to the semi-detached cottage where he lived on the day he discovered that his wife intended to leave him for another man, taking their children with

her. In the case of *R v Oakes* (Current Sentencing Practice - Vol 1 Section (3-2 C01) - a sentence of 2 years' imprisonment was reduced to 15 months' imprisonment and suspended on the ground that the offence was committed as a result of serious financial difficulty, for which the accused was not wholly responsible. On the other hand, the fact that the offence was committed to provide money to support an addiction to drugs was not considered a mitigating factor in the case of *R v Lawrence* (1988) 10 Cr App R (S) 463. In that case, the accused committed several burglaries and stole cash amounting to £6000. He was a heroin addict and all the offences were committed with the purpose of financing his addiction, at a cost of about £90 per day. Simon Brown J stated thus:

It is no mitigation whatever that a crime is committed to feed an addiction, whether that addiction be drugs, drink, gambling, sex, fast cars or anything else.

In the present case the motive was different, and more rational. Hence to a sentencer who has the discretion to impose a lenient sentence on a first offender, this is a classic case. The respondent has already served four months of his term of imprisonment. On a consideration of all the circumstances, acting in terms of section 329(l)(c) of the Criminal Procedure Code, I alter the sentence of 5 years' imprisonment imposed on count 1 to 8 months' imprisonment, and the term of 2 years' imprisonment imposed on count 2 to 6 months' imprisonment. Both terms to run concurrently.

This judgment would effectively dispose of the appeal in case no. CA. 4 of 2000.

Record: Revision Side 1 of 2000