IN THE SUPREME COURT OF SEYCHELLES

ANTOINE CHANG WAYE **APPELLANT**

VERSUS

THE REPUBLIC **RESPONDENT**

Criminal Appeal No 1 of 2004

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Mr. W. Lucas for the Appellant

Mr. J. Camille for the Respondent

JUDGMENT

Perera J

The Appellant was charged before the Magistrates' Court in Praslin, with the offences of burglary and stealing. On 22nd July 2003, after the Learned Magistrate had explained to him his legal rights, he informed Court that he would defend himself. Thereupon after the charges were read to him he pleaded not guilty to both counts. On 28th October 2003, when the case was taken up for trial, the Appellant moved the Court to put the charges to him once again. Thereupon he pleaded guilty on both counts. The Learned Magistrate in sentencing the Appellant stated thus-

> *"The Accused having pleaded guilty to the offence of burglary and stealing, and putting into consideration the fact that the Accused has got previous records on offences of almost the same nature with the one at hand, the Court is made to understand that the Accused is a habitual criminal. That being the case, the Court has nothing other than ordering the Accused to serve the minimum sentences prescribed by the law to the respective offences, that is to say going to jail for a period of five (5) years on the first count and going to jail for a period of one year (1) on the second count. The sentences are to run concurrently.*
>
> *Sgd Mr. MWANGESI*
> ***MAGISTRATE***
>
> *28/10/2003"*

The Appellant has submitted four grounds of Appeal. They are –

"1. The learned trial Magistrate was wrong to convict the Appellant on his own plea of guilty on a charge of such nature and gravity owing the circumstances that he had applied for legal aid and was still waiting for a reply.

2. *The fact that his legal aid application was approved 5 days before the case came for trial, it is evident that a case of such nature, legal representation is always considered and granted whereby failure of the legal Aid Scheme authority to inform him and the trial Court of this approval prior to the case is a denial of him to exercise his constitutional right.*

3. The failure of the learned Magistrate in the circumstances to explain to the Appellant to consequences of pleading guilty to a charge of such nature which carry a mandatory sentence in that if explained thereof he would have maintained his previous plea.

As a result thereof the Appellant suffered serious prejudice resulting a miscarriage of justice.

4. Further in the light of the grounds contained in paragraph 1-3 hereof the Appellant's constitutional right to be legally represented has been grossly contravened and as a result thereof he has suffered serious prejudice resulting in a miscarriage of justice and therefore his conviction is null and void."

As regards ground 1, it is apparent from the record, that the learned Magistrate was neither aware that the Appellant had made an application for legal aid, nor was he told by the Appellant. Hence he proceeded to convict the Appellant and sentence him according to law, on the basis that he had waived his right to legal representation. In these circumstances there is no merit in ground 1.

Ground 2 is also based on the application for legal aid. It was submitted that subsequent to the Appellant pleading not guilty to the charges on 22n[d] July 2003, he had made an application for legal aid and that on 23[rd] October 2003, his application was approved and copies of the certificate were sent to him in Praslin, and to Mr. W. Lucas Attorney at Law. It was therefore submitted that apparently these notices had

not reached the Appellant when on 28th October 2003, he changed his plea. Therefore he was unaware that Counsel had been assigned to him on legal aid. It was submitted that had he been aware, he would undoubtedly have informed the Magistrate and moved for an adjournment. Although there may have been a delay in informing the Appellant and his assigned Counsel, the Appellant knew that his application was pending and hence ought to have sought an adjournment. He cannot benefit by his own default. Hence ground 2 fails.

In ground 3, the Appellant avers that had he known that the offences for which he pleaded guilty carried a minimum mandatory sentence, he would have maintained his previous plea. This same contention was advanced in the case of ***Sam Esther v. R (Crim. Appeal no. 22 of 1999***). In that case, it was submitted that although the record indicated that the Senior Magistrate had explained the Constitutional Rights to the Accused (as in the present case) there was no clear indication that the right of the Accused to legal aid was specifically explained to him. It was also submitted that the Senior Magistrate ought to have informed the Accused that the offence carried a mandatory minimum sentence of 5 to 7 years depending on whether he was a first or subsequent offender. Sitting in appeal, I held that the right to legal representation is a qualified right, and that there was no obligation on the part of a trial Judge to state the *nature of the penalty* before an Accused is called upon to plead. I further held that the only legal obligation on the trial Judge is to follow the provisions of Section 181(i) of the Criminal Procedure Code, and explain "*the substance of the charge or complaint".*

Learned Counsel for the Appellant, however cited the Court of Appeal decision in ***Raymond Tarnecki v. R (S.C.A. no. 4 of 1996).*** In that case, the Appellant, a resident of the United States of America on vacation in Seychelles, was convicted by the Supreme Court of the offence of trafficking in a controlled drug, upon his pleading guilty to the charge. The trial Judge followed the procedure under Section 181(1) and (2) of the Criminal Procedure Code. In appeal, it was contended, *inter alia* that "*the learned Chief Justice, before convicting, failed to satisfy himself as to whether the Appellant had rightly comprehended the effect of his plea, and that the Appellant did not have a free choice of plea, in that he was misled by the defence Counsel into pleading guilty to the charge, and furthermore the Appellant was not assisted by defence Counsel in understanding the effect of his plea".*

In that case it was established that the Counsel who appeared for the Appellant at the trial failed to advice him regarding the element of presumption of trafficking that arose once he pleaded guilty for possession of drugs. The Court of Appeal expressed the view that this omission amounted to the Counsel advising that, as the Appellant was prepared to plead guilty to possession, the law *conclusively presumed* that he was guilty of trafficking as well. The Court therefore found that this was a case where the Accused did not have a free choice of plea due to erroneous, or inadequate advice by his Counsel on the law which the Appellant was not familiar with as a foreigner on holiday. In these circumstances, the plea tendered was held to be a nullity, and his conviction was quashed.

That decision does not depart from the requirements of Section 181(1) and (2) of the said Code. The trial Judge had discharged his responsibility. There was no legal necessity for him to further clarify the law that the proviso to Section 14 of the Misuse of Drugs Act contained a rebuttable presumption of trafficking once possession was proved or admitted, nor a necessity to inform him of the penalty involved.

The Constitutional Right of a person charged with an offence is to be informed of the nature of the offence. *(Article 19(1) (b) of the Constitution).* Section 181(1) of the Criminal Procedure Code also requires the trial Judge to explain the substance of the charge to the Accused. What is required is that an Accused should know the details and the nature of the charge against him. There is no requirement that the nature of the sentence, be it mandatory or otherwise, be also explained. Hence the Appellant's claim that had he known of the mandatory sentence involved he would have maintained his original plea of not guilty, is untenable. Accordingly ground 3 also fails.

As regards ground 4, as was already stated in respect of ground 3, the right of legal representation is a qualified right. The Appellant had ample opportunity to inform the learned Magistrate that he had made an application for legal aid and sought an adjournment. Instead, he, on his own free will, decided to change his former plea and pleaded guilty. In these circumstances, he cannot now canvass a Constitutional Rights to legal representation, which in any event is a qualified right. Hence ground 4 fails.

Accordingly the four grounds urged in Appeal being devoid of merit, are rejected and the Appeal is hereby dismissed.

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A.R.PERERA

JUDGE

Dated this 6th day of December 2004