IN THE SUPREME COURT OF SEYCHELLES

DANIEL BASTIENNE **APPELLANT**

V/S

REPUBLIC **RESPONDENT**

Criminal Appeal No. 11 of 2005

Mr. A. Derjacques for the Appellant
Mr. Chetty for the Respondent

JUDGMENT

Perera J

The Appellant was charged before the Magistrates' Court with the offence of breaking into a building and committing a felony therein, namely stealing, contrary to and punishable under Section 291(a) of the Penal Code as amended by Act no. 16 of 1995. It was alleged that he stole cash and goods to the value of Rs.11,807. The Appellant was 18 years and 5 months old at the time of committing the alleged offence. The minimum mandatory sentence prescribed for this offence is 5 years imprisonment.

The Appellant was represented by Mr. A. Derjacques Attorney at Law on legal aid. He appeared in Court on the 20th and 22nd July 2005. However on 13th September 2005, Miss C. Hoareau, Attorney at Law stood in for Mr. Derjacques. The Court then made order that the case be mentioned on 6th October 2005 at 1.30 p.m. for plea, and that Mr. Derjacques be informed of the date. Mr Derjacques was informed by letter dated 20th September 2005.

However, on 6th October 2005, the Appellant was present, but Mr. Derjacques was absent. According to the proceedings, the following was recorded by the Learned Senior Magistrate.

"Accused present

Ms Barbe for Prosecution

Mr. A. Derjacques for the Accused absent.
I am ready to answer to the charge.

Court

Charge read and fully explained to Accused in creole.

Plea

I am guilty

Plea of guilty entered."

The Learned Senior Magistrate then proceeded to sentence the Appellant *on the following day* to a minimum mandatory term of 5 years imprisonment.

The Appeal is against the "*entire decision",* which would mean, against both the conviction and sentence. Pursuant to Section 309(I) of the Criminal Procedure Code where an Accused has pleaded guilty there is no right of appeal to this Court "*except as to the extent or legality of the sentence".* It was conceded by Learned Counsel for the Appellant that as the Learned Senior Magistrate had imposed a mandatory sentence, this Court has no power to interfere with that sentence.

The main thrust of the Appeal is that the Appellant who was nearly 19 years old at the time he chose to plead in the absence of his lawyer, ought to have been informed by the Learned Magistrate that the charge involved a mandatory sentence of 5 years imprisonment, and that had he done so, the Appellant may have pleaded differently. It was therefore contended that the plea was not valid.

In the case of ***Sam Esther v. R (Criminal Appeal no. 22 of 1999)*** three accused were *inops consilii* before the Magistrates Court when they decided to plead guilty to a similar charge as in the present case. They were sentenced to the minimum mandatory term of 5 years imprisonment. In appeal it was contended that the Learned Magistrate had not explained to the Accused of their right to obtain Counsel under the legal aid scheme. However, the Magistrate had recorded as follows "I have explained to the three Accused their Constitutional right to legal representation". Whereupon all three Accused had stated that they will not need a lawyer. I held that the granting of legal aid was a qualified right in cases other than where the offence is murder, and that in any event it could not be assumed that the Magistrate having explained the right of legal representation, failed to explain the right to obtain a lawyer on legal aid. A further ground urged was that the Magistrate had failed to inform the Accused that the offence carried a mandatory minimum sentence. I further held 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, as Section 181(i) of the Criminal Procedure Code only requires that –

"The *substance of the charge or complaint shall be stated to the Accused person by the Court, and he shall be asked whether he admits or denies the truth of the charge."*

In the case of ***Balasundaram v. Public Prosecutor of Singapore (1998), 2 CHRLD 37***, the Court *inter alia* that-

> "A litigant is entitled to be represented by the Counsel of his choice if that Counsel is *willing and able to represent him*. *If Counsel fails to turn up, or is not willingly or able to act for the Accused, he or she cannot, by virtue of this fact alone, claim that his or her Constitutional Right has been violated and that any proceedings against him or her are rendered null and void."*

In the case of ***Maxime Moise and Or v. R (1965-1976) S.C.A.R. 122,*** a situation, similar to the present matter arose. When fixing the trial date the Magistrate took into consideration an application made by State Counsel that an early date was required as there was an issue of Public Order involved. He fixed 3rd May 1974 for trial "*whether or not the Accused are able to obtain a lawyer."* The two Accused had retained the services of a lawyer, who failed to appear on the day fixed for the trial. The Prosecution moved that the trial be commenced. The 1st Accused had no objections, but the 2nd Accused wished to be represented by the Counsel both of them had retained. The Magistrate then recorded that he would commence the trial as the case had been fixed for early hearing on the application of the State as an issue of Public Order was involved. He further recorded that the Court would be particularly vigilant to protect the interests of the Accused. They were convicted and sentenced after trial.

The Seychelles Court of Appeal held that on the day fixed for the trial the Accused were unrepresented due to no fault on their part, and hence the Magistrate ought to have, in these circumstances, considered whether an adjournment might reasonably be granted, especially as the 2nd Accused had informed him that he wished to be represented. Accordingly the case was remitted back to the Magistrates' Court for re-trial.

That was a case where the trial was conducted by the Accused appearing in person. As was held in the case of ***Robert Confait v. Republic (1957) E.A. 555***-

> *"Their defence would, if in the hands of an advocate, doubtless have been conducted with greater advantage to them."*

However, it is of interest that the Privy Council, in the case of ***Robinson v. R (1986) L.R.C. (Const) 405 at 414*** stated that "*the right to legal representation is not absolute in the sense that adjournments must always be repeatedly granted to secure legal representation. There are other relevant considerations to be taken into account …….. one other relevant consideration is the present and future availability of witnesses".*

In the present case, there was no trial as the Accused pleaded guilty to the charge which was read and

explained to him. The only issue which the Court ought to consider is whether he chose self representation with his "*eyes open".* In the case of ***Nashad Ali v. The State (2003) 4. CHRLD 162*** where the Accused declined to have legal representation and pleaded guilty, it was held that he had only a right of Appeal against sentence, but that will not apply where the plea is in any way equivocal and uncertain or where the Accused did not fully understand the effect of the plea, that is, that *he was admitting the offence with which he had been charged*.

In the case of ***Raymond Tarnecki v. R S.C.A. no. 4 of 1996,*** the Accused, a tourist, pleaded guilty to a charge of trafficking in cannabis. In appeal, it was contended that his Counsel had given him erroneous and misleading opinion that possession of the controlled drugs raised an irrebuttable presumption of trafficking, and that hence he had not exercised a free choice of plea. The Court of Appeal held that the Appellant had been deprived of a freedom of choice in the plea he made, and that hence that plea was a nullity. The conviction was accordingly quashed. In that case, trafficking carried a minimum mandatory sentence of 8 years imprisonment, to which the Accused was sentenced. However no submission was made as regards the Accused not been informed about the mandatory sentence attached to the charge, to which he pleaded guilty.

The statutory requirement under Section 181 (i) of the Criminal Procedure Code, as well as the Constitutional requirement under Article 19(2) (b) of the Constitution is that the Accused should be informed of the *substance* of the charge or the *nature* of the charge. Although the charge sheet states the Penal provision under which the offence is punishable, there is no requirement that the trial Judge should inform the Accused regarding the mandatory nature of the punishment attached to the charge. So long as the Court is satisfied that the Accused had a free choice between pleading guilty or not guilty, a conviction on a guilty plea is valid. In the present case, there is nothing to indicate that the Appellant did not understand the nature and substance of the charge. Hence when he was asked whether he admits or denies the truth of the charge, he chose freely to admit guilt. In these circumstances, it would not be a valid contention that had he been informed of the mandatory nature of the sentence he would have chosen otherwise.

In these circumstances, the Appeal is dismissed.

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A.R. PERERA

JUDGE

Dated this 12th day of December 2005