IN THE SUPREME COURT OF SEYCHELLES

EXCEL JEAN **APPELLANT**

V/S

THE REPUBLIC **RESPONDENT**

Criminal Appeal No 7 of 2005

Mr. Freminot for the Plaintiff
Mr. Esparon for the Republic

JUDGMENT

Perera J

This is an Appeal against a conviction and sentence from the Magistrates' Court at Anse Royale. The Appellant was jointly charged with one Bernard Padayachy with the offence of receiving stolen property, contrary to Section 309(1) of the Penal Code. According to the particulars of the offence in the substituted charge filed on 7th April 2004, both of them, on 4th September 2002 retained in their possession one outboard engine 25 HP, make "*Johnson*" valued at Rs.12,000, being the property of Walter Payet, knowing or having reason to believe the same to have been feloniously stolen. Upon conviction, they were liable to be sentenced to imprisonment for 14 years.

On 4th August 2005, the 1st Accused (*the present Appellant)* pleaded guilty to the charge, and was sentenced to a term of 5 years imprisonment. The 2nd Accused pleaded not guilty. The facts disclosed by the Prosecution were that the engine was retained by the Appellant and sold to one Mr Ah-Kon of La Digue for Rs.12,000. Subsequently, the Police seized the engine and returned it to Walter

Payet the rightful owner. Learned Counsel for the Appellant in his plea in mitigation, also submitted that the engine was picked up by the Appellant at Providence and was sold.

Subsequently, on 6th July 2006, the 2nd Accused, Bernard Padayachy also pleaded guilty to the charge. The Prosecutor did not disclose the facts relating to that Accused in detail, but merely stated "*facts as per charge sheet*". However Learned Counsel for the Accused submitted in mitigation that –

> *"He was a victim of circumstances. He had not stolen engine but found it at Roche Caiman. He has been very helpful to the Police. Complainant has received outboard engine back."'*

Learned Counsel therefore pleaded for a non custodial sentence. The Learned Magistrate in sentencing the Accused stated that she took into consideration the fact that the Accused had pleaded guilty saving the time of Court, and also the submissions of the defence Counsel in mitigation. She therefore decided on a non custodial sentence, and sentenced the Accused to a term of 2 years imprisonment suspended for a period of 3 years. No appeal has been filed against that sentence.

Before considering the grounds of appeal relied on by the 1st Accused Appellant, I wish to draw the attention of Prosecutors to the Practice Direction No. 1 of 1971 issued by the then Chief Justice, as reproduced in *(1970-1971)* Seychelles Law Reports. When called upon by the Magistrate to state the facts and circumstances, after an Accused person pleads guilty, the facts upon which the Accused was charged must be disclosed with sufficient particularity. The Accused who has pleaded guilty, must be given an opportunity to admit all or any of them.

As the Practice Direction states, *"this procedure will enable the Magistrate to satisfy himself as to whether the Accused person understands the charge, and at the same time to ascertain the facts and circumstances which he admits".*

In sentencing the 2nd Accused, Bernard Padayachy, the Learned Magistrate was deprived of the facts relied on by the Prosecution and hence had to confine herself to the submission of the defence Counsel that the 2nd Accused was a "*victim of circumstances*". In the present Appeal, the same Counsel submitted that it was *"actually the second Accused who kept the outboard engine*", and that the 1st Accused had merely picked up an old outboard motor which was not in a working condition without knowledge that it belonged to Walter Payet. Had the Learned Magistrate been furnished with the detailed facts of the participation of the 2nd Accused in the offence, the sentence may have been different.

However, the defence Counsel informed Court that the Accused was serving a sentence and that he had two more years to serve. I have obtained an updated record of the previous convictions of the Accused. I find that the Appellant was convicted in two separate cases, bearing numbers 505/04 and 506/04 of the Magistrates' Court, for housebreaking and stealing after committing the present offence, and sentenced in each case for 4 years on count 1 and 3 years on count 2, to run concurrently to each other and concurrent to case no 506/04. Hence effectively, he was to serve a period of 4 years from 5th August 2004. With a possible remission, the Appellant had about 1 year and 4 months of that sentence to serve. Learned Counsel for the Accused prayed for a concurrent sentence in the event of a custodial sentence being imposed. The sentencing order is as follows-

"……………… Although the Accused has a previous conviction

dated 15/6/2001 for criminal trespass, I will not take it into consideration when passing sentence since it is not a similar offence to the present one. I will therefore consider this present conviction as the first conviction for the Accused for such an offence.

The Accused is sentenced to undergo a term of 5 years imprisonment. The sentence shall begin as from the date of this order. So I order

Sgd. L. Pilay (Mrs),
Magistrate"

Hence when the Appellant was sentenced for 5 years imprisonment on 6th September 2005, he was effectively sentenced to a term of 3 years and 8 months for the present offence. I do not find that sentence to be harsh and excessive. Accordingly grounds 1 and 3 of the Appeal fail.

In ground 2 the Appellant avers that he pleaded guilty to the offence of "*retaining stolen property*" and the Magistrate failed to consider the circumstances by which the property was retained. In the substituted charge, the Appellant was charged under Section 309(1) for "*retaining stolen property".* However, by virtue of Section 344(a) of the Criminal Procedure Code, the Court is satisfied that this error in the charge has not occasioned a failure of justice. However unlike on a charge under Section 310 for unlawful possession, the essence of a charge under Section 309 is knowledge on the part of the person who retains or receives the property, that it was stolen or unlawfully obtained. Unlike for the 2nd Accused, it was not pleaded nor disclosed that the present Appellant had no knowledge regarding the ownership of the engine. Hence it could not be sated that the Learned Magistrate failed to

consider the circumstances in which the engine was retained by the 1st Accused Appellant,. Accordingly ground 2 of the Appeal fails.

In the circumstances, the Appeal against sentence is dismissed.

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A.R. PERERA

JUDGE

Dated this 6th day of October 2006