IN THE SUPREME COURT OF SEYCHELLES

Roddy Germain **Appellant**

Vs

The Republic **Respondent**

Criminal Appeal No. 1(a) of 2005

Mr Lucas for the appellant

Mr Esparon for the respondent

D. Karunakaran, J.

RULING

This is an application for leave to appeal out of time against the judgement of the Magistrate's Court, in which the applicant was on 18th March 2005, convicted of the offence of "burglary" contrary to and punishable under Section 289 of the Penal Code as amended by Act 16 of 1995. Following the said conviction, he was sentenced to undergo a mandatory minimum period of seven years imprisonment. All these happened a year ago. Since then he is in prison serving the sentence. Now, he intends to appeal to this Court against the said conviction and sentence. This application is obviously made in terms of Section 310 of the Criminal Procedure Code, which reads thus:

> *310 (1) "Every appeal shall be brought by notice in writing which shall be lodged with the Registrar within 14 days after the date of the order or sentence appealed against.*
>
> *(2) Such notice shall be signed or marked by the appellant or, if the appellant is represented by an advocate, the notice may be signed by such advocate*

(3) Within 14 days after the filing of his notice of appeal, the appellant shall lodge with the Registrar a memorandum of appeal

(4) *Every memorandum of appeal shall be signed or marked by the appellant or signed by his advocate and shall contain particulars of the matters of law or of fact in regard to which the Magistrates' Court appealed from is alleged to have erred, and, except by leave of the Supreme Court the appellant shall not be permitted on the hearing of the appeal, to rely on any ground of appeal other than those set forth in the memorandum:*

Provided that nothing in this subsection shall restrict the power of the Supreme Court to make such order as the justice of the case may require.

(5) If a memorandum is not lodged within the time prescribed by subsection (3), the appeal shall be deemed to have been withdrawn but nothing in this subsection shall be deemed to limit or restrict the power of the Supreme Court to extend time.

The Supreme Court shall have power to extend any time herein provided for the taking of any necessary step in appeal, as it may deem fit."

According to the affidavit dated 29th March 2006 filed by the applicant in support of this application, he was ignorant of law as to mandatory sentence. Neither the court nor the police advised him about the consequences of a guilty plea, rather police induced him to plead so. Therefore, he pleaded guilty to the charge in the Magistrate's Court. After a year, while he was in prison serving the sentence, he accidentally met with his counsel in another case, who advised him to file an appeal against the said conviction and sentence in this matter. Therefore, the applicant's counsel now invites the Court to exercise its discretion, condone the delay and grant leave to appeal out of time against the said judgement of the lower Court.

On the other side, the respondent vehemently objects to this application submitting in essence, that the reason given by the applicant for the inordinate delay of one year is not valid in law.

According to the respondent's counsel, the laches on the part of the applicant or his counsel cannot and do not constitute a valid ground for the Court to condone the delay occurred in this case. At some stage the finality of judicial decisions should be certain and procedural requirements governing appeals from those decisions should not be disregarded so as to prolong uncertainty. Hence, the State counsel urged the Court to dismiss the application.

I gave diligent thought to the submissions made by counsel for and against this application. First, I will begin by saying that it is wrong to assume that the appellate courts by virtue of section 310(5) supra, have unfettered discretion or power to condone laches, eschew the procedural requirements and grant arbitrarily the extension of time to an intended appellant for filing his appeal out of time; that is, beyond the period of delay prescribed by the relevant statute or appeal rules. Here, one should note, the delay, which is allowed by the statute in favour of the appellant, is *peremptory*, and if such delay exceeds the prescribed period, then the appeal is obviously incompetent. This is the rule. The Court cannot and should not use its discretion arbitrarily to infringe the rule and defeat the very purpose for which the legislature has prescribed such time limits for appealing against judicial decisions. As wisely summed up in *Lagesse v CIT 1991* MR 51, that *"at some stage the finality of judicial decisions should be certain and the procedural requirements governing appeals from those decisions should not be disregarded so as to prolong uncertainty"*. Besides, justice should not be procrastinated by frivolous or vexatious appeal attempts by unscrupulous parties by abusing the right of appeal. At the same time, a party, who is genuinely aggrieved by the judicial decision, should never be denied of his right of appeal by strict adherence to the procedural requirements. Indeed, in considering the application of this nature, the Court has a task before it, to separate the chaff from grain and do justice to the genuine ones by condoning the delay.

For a strict constructionist, who sticks to the strict interpretation of law, a non-compliance with any of the procedural requirements for an appeal within the prescribed period of delay is "fatal" to the hearing of the appeal unless such non-compliance was due to no fault of the appellant. This is the traditional approach, which the Courts have adopted in the past vide *Pendo vs. Lutchman 1886 MR 48*. and *Solamalay v R 1920 MR*. However, for an intention seeker of the new age, who subscribes to the liberal interpretation of law, a non-compliance with any of the procedural requirement within the prescribed period of delay is not "fatal" to the appeal, provided the appellant shows a "good cause" to the satisfaction of the court in justification of such non-compliance, whether it relates to the filing of notice or even memorandum of appeal as contemplated under section 310(1) and (3) of the Criminal

Procedure Code, rehearsed supra. This is the modern approach the Courts ought to - in order to steer the procedural law towards the administration of justice, rather than the administration of the letter of the law. Having said that, in deciding whether to grant an extension of time, the court in my considered view, ought to take into account the entire circumstances of the case including:

- whether the applicant formed a bona fide intention to seek leave to appeal and communicated that intention to the opposing party within the prescribed time;
- whether counsel moved diligently;
- whether a proper explanation for the delay has been offered;
- the extent of the delay;
- whether granting or denying the extension of time will unduly prejudice one or the other of the parties; and
- the merits of the application for leave to appeal.

Coming back to the case on hand, the applicant states that he was ignorant of law as to mandatory sentence and of the consequences of his guilty plea, whilst he was asked to plead to the charge in the court below. Indeed, "ignorance of law is not an excuse" - ***ignorantia juris non excusat***. It is a public policy that a person who is unaware of a law whether substantive or adjective may not escape liability for violating that law or eschewing the rules merely because he or she was unaware of its content; that is, persons have "presumed knowledge" of the law including the provisions pertaining to mandatory terms. The rationale behind this doctrine is that if ignorance was an excuse, persons charged with criminal offences or the subject of civil lawsuits would merely claim they were unaware of the law in question to avoid liability, whether criminal or civil. Thus, the law imputes knowledge of all laws to all persons within the jurisdiction no matter how transiently. Even though it would be impossible, even for someone with substantial legal training, to be aware of every law in operation in every aspect of the legal process, this minor injustice is the price paid to ensure that wilful blindness cannot become the basis of exculpation. Thus, it is well settled that persons whether inside or outside the prison, what is applicable to a common man in the street will be applicable to them as well. Hence, on the face of it, the reason given by the applicant on ignorance of law, is not satisfactory to the Court and so I find. In any event, section 309(1) of the Criminal Procedure Code reads thus:

"No appeal shall be allowed in the case of any accused person, who
has pleaded guilty and has been convicted on such plea by the

Magistrates' Court, except as to the extent or legality of the sentence"

In the instant case, obviously, the applicant has pleaded guilty and has been convicted on such plea by the Magistrate's Court. Moreover, the extent and legality of the mandatory sentence imposed by the Magistrate in this matter, is not a ground of challenge. Therefore, the right of appeal, which forms the basis of this application, itself, is questionable. In the normal course of events, the applicant should have filed the notice of appeal within 14 days from the date of conviction. However, having slept on his right of appeal for more than a year, he has now come before this Court with the instant application. As I see it, the applicant has failed to show any good cause to the satisfaction of the Court to condone the inordinate delay. In these circumstances, the extension of time sought by the Appellant in this case is not justified and his application should be refused. I do so accordingly. I make no order as to costs.

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D. Karunakaran

Judge

Dated this 5th day of March 2007