IN THE SUPREME COURT OF SEYCHELLES

DERECK VEL

VS.

THE REPUBLIC

Civil Appeal side No. 19 of 2008

Mr. Camille for the Appellant
Mr. Labonte for the Respondent

JUDGMENT

The appellant was convicted by the Magistrates' Court on his own plea of guilty on one count of stealing by servant contrary to section **260 of the Penal Code, Cap 158'** and sentenced to three years in prison on 24 of September, 2008. The present appeal is against the legality of the sentence and not the conviction. Of course section 309 of the Criminal Procedure Code forbids any appeal arising from a plea of guilty. The appellant contends that the trial court erred in passing sentence before enquiring from appellant whether he fully understood the charge leveled against him and the nature and effect of that plea.

It will be recalled that right from the day (i.e. 7/02/06) the appellant was arraigned before the Magistrate's court and pleaded not guilty to the said charge. He was represented by Attorney-At-Law Ms. Karen Domingue whose

services however were not available on the 20 of August, 2008 when he requested the charge to be read to him anew and pleaded guilty thereto. A thorough examination of the submission of

Mr. Camille reveals a lack of clarity as to whether he is attacking the legality of the sentence only or the whole process of plea- taking. No wonder he concludes by asking the court to invoke section 316 of the CPC and *change* the sentence or to order the sentence herein to run concurrently with the five year jail term which the appellant is currently serving. Can an illegal sentence, if so declared, be maintained, let alone made to run concurrently by a court of law with another sentence being executed by the same convict?

An appellate court will not disturb a sentence passed by a lower court unless ……..

Section 316 of the CPC reads as follows:

> "After hearing the appellant or his advocate, if he appears, and the Attorney General, if he appears, the Supreme Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may –
>
> (a) In an appeal from a conviction
>
> (i) *reverse the finding and sentence and acquit or discharge the accused, or order him to be tried by a Court of competent jurisdiction, or commit him for trial; or*

alter the finding, maintaining the sentence, or with or without altering the finding, alter the nature of the sentence;

with or without such reduction or increase and with or without altering the finding, alter the nature of the sentence;

> (b) in an appeal from any other order, alter or reverse such

order;

and in either case may make any amendment or any consequential or incidental order as to costs or otherwise that may appear just and proper."

The record of proceedings of 20 of August, 2008 before the court *a quo* are *worth* reproducing*:*

"Magistrate

20/08/08

Accused present and unrepresented

Accused wishes to plead anew

Court: Charge put to accused upon his own motion.

Accused pleads guilty

Plea of guilty entered

Prosecution / facts / needs time for facts

Court: Mention on the 2/09/08 at 9:00am for facts, mitigation and sentence and Superintendent of prison to be notified.

(SD) S. Govinden

Magistrate"

The facts which were put to and admitted by the accused had been read out on the

12 of September, 2008 and followed by the conviction. Although still not

represented by counsel one could argue, as State counsel Mr. Labonte attempted to, that the appellant had enough time to reflect on the effects of the charges proffered against him before tendering a guilty plea. Does this however mean that he understood the gist of the charge and the effects of his plea? I think it is incumbent upon a Judge to go a step further, but with much care not to assume or be seen to play the role of defense counsel, and explain not only the procedure but also the rights of an accused whenever an unrepresented defendant appears before court. It was held in **R Vs Rochdale Justices, Ex Parte ALLWORK (Divisional court)** that;

> "where a defendant before the Magistrates pleads guilty to an offence, the Magistrates…will always take steps to ensure that the defendant , particularly if he is young or under any disability (in this case unrepresented), fully understands the charge leveled against him and the nature and effect of the plea before they pass to sentencing him."

Alleear CJ, while agreeing with the appellant's counsel in **Ralph Etheve Vs Rep, Supreme Court Criminal Appeal. No.15 of 2006** sounded a similar warning in the following terms:

> "…I believe that in every case when a legally unassisted person appears before court and wishes to tender a plea of guilty to an offence, the presiding officer is under a duty to inform the person about the consequences of that plea especially if he is minded to impose a custodial sentence or if there are other mandatory sanctions that will necessarily follow. Moreover, a similar duty is cast upon the judicial officer to enquire whether or not there are any special reasons for not imposing a mandatory sentence."

It is apparent from above and in light of section……that the sentence meted

out in itself is not wrong. However, it remains unclear whether the Magistrate indeed advised the accused as required by the cited authorities or not. It could be possible that the appellant was duly warned of the consequences of his plea before taking the plunge but now denies that fact after feeling the 'pinch' of the sentence. Whatever the case, only the record of proceedings can reveal what exactly transpired at that sitting and since no mention of this is reflected therein, I take it that the appellant was never advised accordingly. It is immaterial whether the change of plea was initiated by the appellant himself. The situation would have been different if the appellant had been duly represented by counsel at that time.

Suffice it to say, with these kinds of affairs that although a Magistrate's court is not a court of record every judicial officer must keep a well detailed record of proceedings before their court outlining the pertinent features of the matter at trial. The brevity and clarity of the proceedings is crucial. In short, the document must speak for itself, reflecting what was said by the judicial officer as well as the accused and or his counsel since the author may never get opportunity to explain what exactly they meant to say or write down.

In conclusion therefore and for reasons already given above I shall not accede to the orders sought by the counsel but will instead set aside this sentence and order for a retrial of the appellant before another Magistrate.

D. GASWAGA

JUDGE

Dated this ……..of December, 2009