IN THE SUPREME COURT OF SEYCHELLES

MIKE LESPERANCE
VS.
THE REPUBLIC

Criminal Appeal Side No. 6 of 2009

Ms. Jumaye standing in for
Mrs. Cesar for the Republic
Mr Gabriel standing in for
Mrs. Armesbury for the Accused

RULING

Burhan J

This is an application for leave to appeal out of time against the conviction of the accused entered on his plea of guilt. The appeal is preferred against the said conviction by the learned Magistrate.

The background facts are that the Appellant in this case while being unrepresented in the Magistrates court pleaded guilty on the 4th of September 2008 to the charges of,

1) Entering a dwelling house at night with intent to commit a felony therein contrary to and punishable under section 290 of the Penal Code.

2) Attempted robbery contrary to section 378 as read with section 280 and 281 of the Penal Code.

The learned Magistrate proceeded to convict him on his plea in respect of both counts and sentenced him as follows;

Count one- a term of 1 year imprisonment.

Count two- a term of 2 years imprisonment.
Both terms to run concurrently.

Learned counsel for the Appellant filed notice of appeal on the 5th of May 2009 a period of over 8 months after the conviction and sentence were entered. It is pertinent to mention at this stage that the main grounds of appeal urged by learned counsel for the Appellant are that the conviction is unsafe and unsatisfactory as;

The Appellant being a first offender and unrepresented should have been informed of the consequences of a guilty plea to a charge that could potentially carry a mandatory term of imprisonment

The Appellants guilty plea was not voluntary as it was not based on information to which he was entitled prior to the plea.

The Appellants did not get a fair trial in all the circumstances of the case.

The question before this court at present is whether leave

to appeal should be granted in respect of the said notice and memorandum of appeal filed out of time. The law relevant to this appeal is contained in the following sections of the Criminal Procedure Code. Section 310 (1) reads as follows;

"An 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".

Section 310(3) states that;

"Within 14 days after the filing of his notice of appeal, the Appellant shall lodge with the registrar a memorandum of appeal".

Section 310 (5) reads as;

"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.

Section 310 (6) reads as;

"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".

Learned counsel for the Appellant herself filed an affidavit giving reasons for the delay stating inter-alia

that;

The Appellant was unrepresented and upon arriving at the prison had asked one of the Wardens to file a notice of appeal for him. Due to the disturbances prevailing in the prison during the recent months the Appellant had got to know that the prison guard he had spoken to about his notice of appeal, had resigned, possibly without filing his notice of appeal. His subsequent application for legal aid had been turned down because of the time elapsed since his conviction and therefore in the interest of justice the Appellant be granted leave to appeal out of time.

Learned State Counsel objecting to the said application, informed court that the disturbances in the prison were of recent origin and did not extend back to September 2008. She further informed court that the Attorney General's Department had filed a Revision application in respect of the same case, as the minimum mandatory term of imprisonment had not been imposed by the learned Magistrate.

The main ground urged by learned counsel was that the Appellant had informed one of the Wardens to file a notice of appeal for him. There is no statement or affidavit filed by the Appellant himself to support this fact. Further in the case of ***Edward Battin v Government of Seychelles(Constitutional Court***

Case No 2 of 2004) it was noted by the Constitutional Court in dealing with a contravention of Article 19(11), that in the " admission form" to be filled at the prison, the accused in that case, had answered the question as to whether he intended to appeal against the conviction and sentence, by deleting the words "do not" and leaving the words "I do". Thereafter the accused in that case alleged someone had deleted the word 'I do" as well and written the words "do not'.

However learned counsel has not made any reference to such an "admission form" in this case and merely relies on her own affidavit to support her application. To permit this application on such frivolous grounds would open the floodgates to such applications, as virtually all convicts would come to court and mention that they had told a Warden to file an appeal and he had failed to do so. It is noted the Appellant has conveniently not sought to name the Warden concerned.

Learned counsel for the Appellant also stated in her affidavit that the Warden had retired following the recent prison unrest. As correctly pointed out by learned counsel for the Respondent and admitted by learned counsel for the defence, the prison unrest was of recent origin and not as far back as September 2008 when the Appellant was convicted. The Appellant had therefore ample time to verify from the Warden concerned, whether a notice of appeal had been filed or not, prior to the prison unrest and the Warden's subsequent resignation. The explanation given by the Appellant for his delay is not acceptable and when one considers the extent of delay, it

is clear the Appellant is guilty of laches.

It is not necessary to consider the merits of the appeal in which leave to appeal out of time is being sought, however as counsel has mentioned that this is an appeal on conviction, the attention of court is drawn to section 309 (1) of the Criminal Procedure Code.

"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".

It is also to be noted that in the case of ***Sam Esther v Republic (Criminal Appeal No 22 of 1999***) it was held by Perera J (as he was then) that there was no obligation on the part of the trial judge to state the nature of the penalty before an accused is called upon to plead.

Further in a similar application before the Supreme Court of Seychelles in the case of ***Roddy Germain v The Republic (Criminal Appeal No 1(a) of 2005)*** Karunakaran J refusing the application held *"… the Applicant has failed to show any good cause to the satisfaction of the court to condone the inordinate delay".*

The Appellant in this case too has failed to show good cause for the delay in filing his notice of appeal and memorandum of appeal. For the aforementioned reasons

this court proceeds to decline the application for leave to appeal out of time.

M.N. BURHAN

JUDGE

Dated this 22nd day of June, 2009.