IN THE SUPREME COURT OF SEYCHELLES

THE REPUBLIC
VS.
1. **JACQUELIN DUBEL**
HERALD FREMINOT

Revision Side No. 2 of 2008

Mr. Labonte standing in for
Mr Durup for the Republic
Both Accused - Present

JUDGMENT

Burhan J

This is a Revision application filed by the Attorney General in terms of section 328 of the Criminal Procedure Code Cap 54, in respect of the sentence passed by the Senior Magistrate (W Mutaki) on the two Respondents (accused) in this case.

Section 328 of the Criminal Procedure Code reads as follows:

"The Supreme Court may call for and examine the record of any criminal proceedings before the Magistrate's court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the Magistrates' Court."

On perusal of the said record it is observed that the

charges preferred against the 1st and 2nd Respondents read as follows.

Count 1

Burglary contrary to and punishable under section 289 (a) as read with section 23 of the Penal Code.

Count 2

Stealing from dwelling house contrary to and punishable under section 264 (b) read with section 23 of the Penal Code.

The 1st and 2nd Respondents were convicted on both counts on their own plea of guilty and a sentence of 12 months imprisonment was imposed on each of the Respondents in respect of count 1 and 2 and ordered to run concurrently.

The Attorney General seeks to move in Revision against the sentence imposed on the two Respondents on the grounds that the minimum mandatory term of 5 years imprisonment had not been imposed by the learned Senior Magistrate in respect of count one and therefore the sentence imposed is wrong in law and should therefore be revised.

Learned counsel for the Attorney General seeks to rely on section 27 A (1), (c) and (i) of the Penal Code as amended by Act No 16 of 1995 which read together state that:

“Notwithstanding section 27 and any other written law, a person who is convicted of an offence in Chapter XXVIII or Chapter XXIX shall-

Where the offence is punishable with imprisonment for more than 10 years or with imprisonment for life-

And it is the first conviction of the person for such an offence or a similar offence, be sentenced to imprisonment for a period of not less than five years.”

Section 289 of the Penal Code as amended by Act No 16 of 1995 provides that a person convicted of the offence of “Burglary” is liable to imprisonment for 14 years.

It follows that, as the offence of Burglary falls within Chapter XXIX of the Penal Code and the offence is punishable with imprisonment *for more than 10 years* (emphasis added) the minimum mandatory term of 5 years imprisonment, should have been imposed on both convicts in respect of count one. However a term of 12 months imprisonment only has been incorrectly imposed by the learned Senior Magistrate.

It is to be noted that according to the proceedings, prior to imposing the said sentence, learned counsel for the prosecution has stated that;

"Both accused are first offenders and offence is *not* *(emphasis added) mandatory on sentences."*

Be that as it may, it is primarily the duty of court to impose the correct sentence prescribed by law. For all purposes the sentence imposed by the learned Magistrate of 12 months imprisonment on each of the Respondents in respect of count one is incorrect and herewith set aside and the minimum mandatory term prescribed by law which is a term of 5 years imprisonment is hereby substituted.

While seeking the enhancement of the sentence of the two convicts, learned counsel for the Attorney General has brought to the attention of this court and conceded, that the minimum mandatory term of 5 years imprisonment for the offence of Burglary has not been explained to the two Respondents prior to their plea being taken. Learned counsel for the Attorney General further submitted that in accordance with the case of ***Rep v Paul Oreddy SCA 9 of 2007*** there was an apparent discrepancy in the process of conviction in this case too. It is to be noted that in the ***Paul Oreddy*** case the conviction was set aside as the plea of guilt was based on a misapprehension of the law and facts by the accused and thus did not amount to an unequivocal plea of guilt by the accused.

When one considers the relevant circumstances of this

case, it is apparent that neither the prosecution counsel nor court were aware of the minimum mandatory term of imprisonment in respect of count one. In such a situation it would be unfair to presume that the two Respondents should have been aware of the minimum mandatory term of imprisonment. Although in usual circumstances ignorance of the law is not an accepted defence, in this case considering all the aforementioned circumstances, it could be inferred that *all* parties had a misconception or misunderstanding of the law in regard to count one.

However in this instant case, the two Respondents have already served their term of imprisonment and to set aside the conviction and order fresh trial at this stage, as was done in the ***Paul Oreddy case*** would serve no purpose. It would further act to the detriment of the two Respondents and to do so due to the fault of court and the prosecution would be to say least, unfair by them. Furthermore there exists no formal application by way of Revision against the said conviction.

Learned counsel for the convicts has informed court that both Respondents have already served their term and are presently in full employment and are attempting to rehabilitate themselves and relies on the judgment of Alleear CJ in the case of ***Republic v Georgia Alcindor Rev 2 of 1997*** and moves court that in accordance with the said judgment the sentence served by the two Respondents be not enhanced.

Considering all the aforementioned circumstances

peculiar to this case, while the record stands corrected, this court is inclined to in the interest of justice, considering the numerous errors committed by the prosecution and the court, not to enhance the said term of imprisonment already served by the two Respondents.

M.N. BURHAN
JUDGE

Dated this 13th day of November, 2009.