IN THE SUPREME COURT OF SEYCHELLES

EDDISON ALCINDOR APPELLANT
VS
THE REPUBLIC RESPONDENT

Criminal Appeal side no: 20 of 2008

Mr. Derjacques for the Appellant
Ms. Madeleine for the Respondent

JUDGMENT

Burhan, J

This is an appeal against the conviction of the appellant by the learned magistrate (Ms. Laura Pillay) in her judgment dated 18th September 2008 where the appellant the 1st accused was convicted together with the 2nd accused Justin Joel Latilupe of the following charges;

Count one
Breaking and entering into building and committing a felony therein namely stealing, contrary to and punishable under section 291 (a) of the Penal Code as amended by Act 16 of

1995 of the same Code and read with section 23 of the Penal Code.

The particulars of the offence being that Eddison Andre Alcindor and Justin Joel Latilupe during the night of the 19th January 2005 towards the early hours of the 20th January 2005 at Glacis, Mahe broke and entered a building namely the shop of Patrick and Lydia Sinon and committed therein the offence of stealing.

Count two
Stealing contrary to and punishable under section 260 of the Penal Code as amended by Act 16 of 1995 of the Penal Code and read with section 23 of the Penal Code.

The particulars of offence being that Eddison Andre Alcindor and Justin Joel Latilupe during the night of the 19th January 2005 towards the early hours of the 20th January 2005 at Glacis, Mahe stole from the shop of Patrick and Lydia Sinon the following items namely the sum of approximately Rs 15000/- cash, seven bottles of Johnny Walker whisky, certain quantity of Benson cigarettes, certain quantity of telephone cards, one gold ring vale Rs 6000/- all are the properties of Patrick and Lydia Sinon total value approximately Rs 35000/-.

Both accused were sentenced to 5 years imprisonment in respect of count 1 and to 6 months imprisonment in respect of count 2 after conviction. Both terms were to run concurrently. The main grounds of appeal as mentioned by learned counsel for the appellant are that:

a) The learned magistrate erred in law in finding that the case on the evidence adduced was proven against the appellant beyond reasonable doubt.

The learned magistrate erred in law in failing to find material inconsistencies and material contradictions in the evidence of the prosecution witnesses.

b) The prosecution had failed to establish common intention.

Learned counsel for the appellant submitted that the learned magistrate had failed to make any reference to the appellant, the 1st accused, in her judgment other than to find him guilty of the charges against him. However, on perusal of the said judgment, the learned magistrate in her judgment has clearly stated;

"I find corroboration of the evidence of PW3 in that of PW4 who stated that he saw the two accused persons (the appellant and the 2nd accused) walking past where he was patrolling around 9pm. Then he saw them again at 11.30pm coming from the direction of the beach with a plastic gunny

bag. It was his evidence that the 1st accused was carrying the plastic gunny bag and when he shone the torch on them the two accused ran off”

It is clear that the learned magistrate has considered the evidence against the appellant and chosen to accept the evidence of witness Robin Micock a security guard who was on duty at the house of Mr. Mancham and had seen and indentified both accused at 9pm and again at 11.30pm at which time he had seen the appellant carrying a gunny bag in the company of the 2nd accused and on shining a torch on them they had ran away. Therefore it cannot be said that the learned magistrate without giving any reasons come to the conclusion that the appellant the 1st accused was guilty of the said charges.

Learned counsel further submitted that there was a possibility that the appellant had been mistakenly identified by the security guard Micock as according to the evidence of the accomplice Marion Richard who had participated in the burglary with the 2nd accused, he had not seen the appellant after or during the incident. However the evidence of the accomplice shows that he had left the scene of crime when the 2nd accused Justin was still on the roof of the shop they had broken into. He goes on to say he does not know how the 2nd

accused got down from the roof which clearly indicates that he had made an early exit from the scene and would not have known what happened thereafter. Further witness Micock who identified the appellant has stated in cross examination, that he knew the appellant as he had been in Glacis for 9 years and was “tired” of seeing him, showing he had frequently seen the appellant during the 9 year period. Therefore the learned magistrate cannot be faulted for accepting the evidence of this witness in respect to the identity of the appellant in the absence of any contradictions in his evidence.

On a reading of the judgment it is very clear that the learned magistrate had come to the conclusion that both the accused were guilty of counts one and two as they had committed the crime together with common intention. Eventhough the appellant may have not actively participated in breaking into the premises his conduct prior to and soon after the commission of the offence indicates that he too participated in the commission of the offence. In the case of **Barendra Kumar Ghosh v The Emperor 1925 AIR (PC) 1** in the Privy Council Lord Sumner stated “he also serves who only stands and waits” clearly showing that active participation in the act itself is not a necessary factor to prove common intention.

In this jurisdiction in the case of **Republic v Gaetan Rene and ors Criminal Side 28 of 1998** Perera J as he then was

referred to the instances when common intention could be perceived. Actual participation, some overt act, active presence, pre arranged plan as well as immediate conduct after the commission of the offence are material factors which should be considered in common intention. In this instance case although there is no direct evidence of actual participation in the act concerned, there is evidence of preplanning and evidence that the appellant was seen at 11.30pm in the night close to the scene clutching a gunny bag in the company of the 2nd accused who had broken into the shop and had acted suspiciously by running away when confronted by the security on duty at Mr. Mancham's house, which evidence has been accepted by the learned magistrate. This court sees no reason as to why the learned magistrate's findings in accepting the said evidence should be set aside. This court will not seek to interfere with the findings of the trial judge in respect of the truthfulness of the witnesses as it not apparent that the witnesses' testimonies are so improbable that no reasonable tribunal would believe it.

For the aforementioned reasons there is no merit in the grounds urged by learned counsel in his appeal. The appeal is dismissed and the conviction and sentence imposed upheld.

M. BURHAN

JUDGE

Dated this 29th day of March 2010