

IN THE SUPREME COURT OF SEYCHELLES

THE REPUBLIC

VS.

DAVID BAKER

Revision side No. 5 of 2007

Mr. Durup for the Republic

Mr. Herminie for the Accused

JUDGMENT

Gaswaga, J

By a letter dated 3rd April, 2007 State counsel Clifford Andre on behalf of the Attorney General moved this court to review the sentence imposed by the Magistrate's court on the ground that it is 'wrong in law'. The accused had pleaded guilty to the offence of possession of forged currency notes contrary to and punishable under section 345 of the penal code. The particulars alleged that David Baker of Copolia, Mahe, on the 15th day of July, 2003, in the district of Victoria, Mahe without lawful authority was found in possession of six forged one hundred Seychelles Rupees currency notes.

After a plea of mitigation by his counsel the court sentenced him to '**a fine of**

Sr 1,000 in default to undergo a term of two (2) weeks in prison’. It is this sentence that is being challenged. Learned State counsel Rene Durup relies on the seriousness of the offence at hand and contends that it is a felony, classified as one of the most serious offences in the penal code. Further, that *‘by virtue of such classification it passes the threshold for a custodial sentence’*. He cited the authority of **Howard (1985) 82 Cr App R 262**, wherein the Court of Appeal laid down the guidelines for cases involving counterfeit notes. The Court stated that a custodial sentence **would be required in nearly all cases** where counterfeit notes have been passed and any other factor, such as the quantity of counterfeit money, how much was passed and knowledge goes only to the severity of the custodial sentence.

Counsel also submitted that on the lower end of seriousness, as is the case at hand, the case of **Shah (1987) 9 Cr App R (S) 167**, is a guide. A single counterfeit note had been passed in a transaction without the knowledge of the offender and without any evidence of dealing. Steyn J stated that although this case was at the lower end of the spectrum of seriousness “in the absence of exceptional circumstances an immediate custodial sentence is necessary in all cases involving the tendering or passing of forged bank notes”. A custodial sentence of 12 months, suspended for two years and a supervision order was imposed.

After stating that this offence is not punishable with a fine under the Seychelles law, the learned State counsel went on to submit thus; ‘section 345 must be read with chapter VI of the Penal Code, particularly section 28. Fines with imprisonment as default may only be imposed where the sentence is stated either as being a fine only or both a fine and imprisonment (s.28 (c)). Section 345 is silent on fines as punishment and only states the possibility of having a custodial sentence’.

I find it imperative to reproduce some of the provisions referred to above if one is to comprehend this submission. Section 345 of the penal code, Cap 158 reads as follows:

“Any person who, without lawful authority or excuse, the proof of which lies on him, imports into Seychelles or purchases or receives from any person, or has in his possession, a forged bank note or currency note, whether filled up or in blank, knowing it to be forged, is guilty of a felony, and is liable to imprisonment for seven years.”

As for section 28 (c) it provides thus:

“In the case of an offence punishable with imprisonment as well as a fine in which the offender is sentenced to a fine with or without imprisonment and in every case of an offence punishable with fine only in which the offender is sentenced to a fine the Court passing sentence may, in his discretion –

- (i) direct by its sentence that in default of payment of a fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in addition to any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of sentence; and also*

According to the Collins dictionary a ‘serious offence’ is one that is ‘grave in nature’ while a ‘felony’, as defined by section 5 of the penal code, “ *means an offence which is declared by law to be a felony or, if not declared to be a misdemeanor, is punishable, without proof of previous conviction, with death, or with imprisonment for three years or more;*”

Although a reading of section 345 shows that the offence herein is a felony, in my view, this does not mean that the intention of the framers of the said provision was to have three (3) years as the minimum sentence to be imposed otherwise the Act would have expressly stated so. My understanding of section 345 is that only the maximum sentence of seven years is set but not the minimum, which could be a fine or even fall below three years of imprisonment. **Section 27 (2) of the penal code** is instructive on the matter and reads *inter alia*:

“A person liable to imprisonment may be sentenced to pay a fine in addition to or instead of imprisonment.”

Had learned State counsel addressed his mind to this provision obviously he would not have cited section 28 (c), which is inapplicable to this case, nor arrive at a conclusion that the offence is not punishable with a fine according to our laws, as he did. Obviously the authorities cited are persuasive and reflect the seriousness attached to such offences in that country as well as the views of the court when it comes to passing sentence. Whereas this approach could be borrowed and followed here it must be clearly stated that this is not the position of our law as it stands. It is entirely a different matter if the Republic holds the feeling that the sentence of a fine was inadequate and would have found a custodial sentence appropriate. But this is not what has

been sought.

According to section 329 (1)(b) and (c) of the criminal Procedure Code, this Court, in exercising powers of revision, is empowered to make any orders it could make in exercising its appellate jurisdiction. But according to the case of **Dingwall Vs Rep. (1966) SLR 205** an appellate court will not interfere with the sentence passed by a subordinate court except in the following circumstances:

(a) Where the sentence is not justified by law, in which case it will interfere not as a matter of discretion, but of law;

Where the sentence has been passed on wrong factual basis;

Where some matter has been improperly taken into account or there is some fresh matter to be taken into account; and

Where the sentence was wrong in principle, or manifestly excessive.

Further, the said authority held that “*an appeal court is not empowered to alter a sentence on the mere ground that if it had been trying the case, it might have passed a somewhat different sentence*”. From the above discourse I see no reason to interfere with the sentence passed by the lower court as it does not offend the law especially section 345 of the penal code as submitted by the learned state counsel. In addition, and bearing in mind the submission of Mr Herminie that the case was committed in the year 2003 and a conviction secured on 30th November, 2006 whereupon the appellant paid off the fine instantly, it would be unjust for this court to enhance the sentence herein four years later. Accordingly, and in line with the holding in **Dingwall** case the sentence will be left to stand.

D. GASWAGA

JUDGE

Dated thisof March, 2010