

Pillay v R
(2013) SLR 249

Dodin J

24 May 2013

Criminal Appeal 12/2011

Counsel R Durup for the appellant

H Kumar for the respondent

DODIN J

[1] The appellant was convicted of the offence of stealing from the person in case number 866 of 2010 on his own plea of guilty and was sentenced to four years imprisonment and a fine of R 25,000 out of which a sum of R 10,000 is to be deducted to be paid to the victim as compensation. In another case number 868 of 2010 the appellant, on his own guilty pleas on one count of stealing from the person and one count of assault occasioning actually bodily harm, was convicted to five years imprisonment and a fine of R 10,000 on the first count and six months imprisonment on the other count. The sentences in case number 868 of 2010 are to run consecutive to the sentence in case 866 of 2010 and also consecutive to other sentences the appellant was then serving.

[2] The appellant now appeals against the conviction and sentence on the ground that in both cases, that is 866 of 2010 and 868 of 2010, he was not properly informed in detail of the nature of the offences and the full aspects of the punishments he was faced with and moved the Court to quash the convictions and sentences imposed by the Senior Magistrate.

[3] Counsel for the appellant submitted that art 19(2) of the Constitution of Seychelles was not complied with by the Senior Magistrate in that the Senior Magistrate did not satisfy herself that the appellant understood the nature of the offences and the full extent of the punishments he would face if he pleaded guilty particularly in view of the fact that the appellant was not legally represented at the time. Counsel submitted that the Senior Magistrate ought to have informed the appellant at the time that he faced maximum sentences of 10 years for offences under s 264(a) of the Penal Code and that it was not sufficient to inform the appellant only that he faced prison sentences for such offences.

[4] Counsel concluded that such omission by the Senior Magistrate amounted to a breach of the appellant's constitutional right, particularly art 19(2) and therefore the convictions and sentences in the above cases should be quashed.

[5] Counsel for the Republic submitted that the appellant was represented throughout the initial stages of the case but failed to appear on the date of the trial and that it was the appellant who on that day decided to change his plea to guilty. Counsel further submitted that the Senior Magistrate did inform the appellant of the nature of the punishments he was likely to get which would be sentences of imprisonment but that the appellant subsequently maintained his decision to plead guilty. Counsel submitted that in the circumstances the pleas taken by the appellant were not taken as a result of misapprehension of the law or the facts or the nature of the charges against him.

[6] Counsel submitted that the sentences imposed by the Senior Magistrate were safe and satisfactory in the circumstances and hence moved the Court to dismiss the appeal.

[7] I have studied the record of proceedings before the Senior Magistrate particularly those dated 30 August 2011 to which this appeal refers. In both cases, the appellant informed the Court that he intended to change his plea to guilty and in both cases, the Senior Magistrate advised the appellant that she would consider prison sentences for the offences should he plead guilty and in both instances the appellant maintained his decision to change his plea to guilty.

[8] This appeal raises two issues which this Court has to determine. First, whether the appellant was sufficiently advised of the consequences of his guilty pleas, and second whether in the absence of his attorney, it was proper for the Senior Magistrate to proceed with the trial.

[9] In the case of *Dietrich v The Queen* (1992) 177 CLR 292, the High Court of Australia noted the inherent unfairness characteristic of trials wherein accused persons are unrepresented. The Court recognised the fact that lack of legal representation places the accused at a disadvantage. The Court reiterated that a proper defence of the accused requires a proper knowledge of the rules of evidence and procedure. Highlighting the legal complexities faced by the unrepresented accused and the need for professional guide, the Court had this to say:

Skill is required in both the examination in chief and the cross-examination of witnesses if the evidence is to emerge in the best light for the defence. The evidence to be called on behalf of the accused, if any, must be marshalled so as to avoid raising issues which will be damaging to the case for the Defence. A decision must be made whether the accused is to give evidence on oath, is to make an unsworn statement or is to remain

mute. Competence in dealing with these matters depends to a large extent upon training and experience.

[10] In the Botswana case of *Rabonko v The State* [2006] 2 BLR 166 Lesetedi J stated at p 168C–D:

An accused person has in terms of s 10(1) of the Constitution an entitlement to a fair trial. In my view, a fair trial cannot be realised where an accused person does not understand the import of the criminal proceedings which he is facing nor have a rudimentary idea as to how not only to present his case but to conduct his defence by way of putting the essential elements of his defence to the prosecution witnesses. That there is a duty upon a presiding judicial officer to assist an accused person who is unrepresented and seems not to understand the court procedures, in the conduct of his defence has been expressed in a number of cases.

[11] No hard and fast rules can be laid down as to when or to what extent a court should intervene on behalf of accused persons. Each case depends upon its own circumstances. Judicial enabling is a settled practice especially in the Magistrates' Court. In this regard, a Magistrate would ask the unrepresented accused pertinent questions and also give the accused an opportunity to speak. However one should keep in mind that the Magistrate cannot act in a different capacity such as advisor to an accused as stated in the case of *Sunassee v State* [1998] MLR 84. The Court rightly stated thus:

The accused in a criminal case certainly has a number of rights and is entitled to take several courses of

action as the trial proceeds. When an accused person is inops consilii, it is the court's duty to offer him a certain amount of guidance in order to help him not to miss important opportunities which are open to him, under the existing procedure, to challenge the evidence of the prosecution or to present his own defence.

The Court however continued as follows:

It stands to reason, however, that whilst the essential stages of the procedure are to be brought home to an accused who is unrepresented by counsel, the Court cannot act as an advisor to the accused as to various tactical possibilities open to him as the trial unfolds, nor can the Court indicate to him all possible moves open to him at every stage and which could have been adopted by counsel if there was one assisting the accused.

[12] Hence a Magistrate should as much as practicable follow the following simple rules to ensure that an accused person who is unrepresented receives as fair a trial as possible:

- a) advise an unrepresented accused person at the onset of the constitutional and legal rights to legal representation at the accused person's own expense or available from state funds;
- b) advise an unrepresented accused person of the right, purpose and meaning of cross-examination;
- c) advise an unrepresented accused person of any special statutory defence available to him or her;

- d) advise an unrepresented accused person of the right to address the Court at the close of the trial or in mitigation if necessary;
- e) advise an unrepresented accused person about exceptional circumstances in the case of compulsory sentences; and
- f) advise an unrepresented accused who wishes to plead guilty to a charge, the consequences of such plea, the range of sentences that the law provide and if the facts known to the Court already allows, an idea of the sentence likely to be imposed in the particular accused person's circumstances.

[13] This list is by no means exhaustive as each case may require the presiding Magistrate to advise the unrepresented accused according to the perceived abilities and understanding of that particular accused person at different stages of the proceedings.

[14] The records show that in this case the appellant had been represented by an attorney who was present at the previous sitting when the trial date was set in his presence. There is no evidence or indication that the said counsel was unable to be physically present at the trial for a valid reason that the Court should have considered. It is bad practice by counsel to fail to appear when they know that they have a duty to the Court and to their clients to be present in Court and discharge their duties in accordance with the law. Should the Court condone such practice it would open the door to undue delay and it would be virtually impossible for cases to be dealt with and completed expeditiously or at all. In this case I find that it was proper for the Senior Magistrate to proceed with the trial in the unwarranted absence of the appellant's counsel.

[15] On the first issue, I am satisfied that the only thing needed to be done by the Senior Magistrate was to advise the appellant on the range of sentences provided for by the law and possibly an indication of the sentences likely to be imposed in the circumstances if sufficient evidence had been led by that stage. From my study of the record I am satisfied that the Senior Magistrate sufficiently advised the appellant of the sentences likely to be imposed were he to plead guilty and indeed advised him clearly that in each case he was likely to face a sentence of imprisonment. The Senior Magistrate need not have done more than give an indication of the possible sentence that can be imposed for each particular charge and could not have stated the specific sentences to be imposed because the facts of each offence which could influence the sentences to be imposed had not been led at that time and were only stated in full after the plea had been taken and the facts were admitted by the appellant. Having considered the records of the Magistrates' Court and the relevant submissions, I am satisfied that the Senior Magistrate did the necessary to guide the appellant on the likely outcome of his plea if he pleaded guilty to the charges in question. On that account I do not find any fatal defect in the Senior Magistrate's explanation to the appellant on the likely sentence and I do not find the explanation wanting in any further detail. The submission of the appellant that the Magistrate has failed to satisfy art 19(2) of the Constitution is therefore not properly founded and is rejected accordingly.

[16] With regards to the absence of the appellant's counsel, I find that the Senior Magistrate was correct to proceed with the trial since the record shows that the appellant's counsel was present when the trial date was set with his agreement and no reasonable explanation was given at the time nor has since been forthcoming to explain his non-appearance.

[17] Consequently, I find no merit in this appeal and since I find the sentences imposed by the Senior Magistrate were well within her powers, this appeal is hereby dismissed in its entirety.