IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 60/2013

Appeal from Magistrates Court decision PN 43/2013

[2013] SCSC 86

JAVEN WILLIAM

Appellantversus

THE REPUBLIC

Heard: 21 October 2013

Counsel: Alexia Amesbury for appellant

Benjamin Vipin, State Counsel for the Republic

Delivered: 18 November 2013

JUDGMENT

McKee J

[1] The Appellant seeks leave to appeal against conviction and sentence imposed upon him by the Magistrate on June 2013 following his plea of Guilty to two charges, namely:

[2] [i] Burglary contrary to section 289[a] of the penal code. The Particulars are that the defendant, residing at Grand Anse Praslin on the 23rd of June 2013 in the early hours broke and entered Ocean Jewel a guest house in room no 4 occupied by Amina Mustanr and Faisal Mushtaq with intent to commit a felony therein, namely stealing.

[3] [ii] Stealing from a dwelling house contrary to section 260 and punishable under section 264[b] of the penal code. The Particulars are that the defendant residing at the address aforesaid and on the date aforesaid in the early hours stole from the dwelling house Ocean Jewel a guest house in room no 4 occupied by Amina Mustanr and Faisal Mushtaq one iphone 550 USD, sunglasses 300 USD, 2 bangles 100 USD being the property of the afaidsaid to the total value of RS11,542.

[4] There was a further defendant on the charge sheet, named Ronny Hollanda, who faced one charge, namely: Receiving Stolen Property contrary to section 309[1] of the penal code. This defendant is not part of this appeal but since he is referred to in these appeal proceedings I set out the particulars of offence, which are:

[5] Ronny Hollanda residing at Grand Anse Praslin on 24th June 2013 did receive 1 phone knowing or having reason to believe the same to have been feloniously stolen.

[6] The Record shows that the Magistrate explained his constitutional rights to the Appellant and the Appellant elected to defend himself. The charges were read to the Appellant and he pleaded Guilty to both charges. The remaining charge against defendant Hollanda was continued without plea. The facts were narrated to the Appellant as set out in the charge sheet. The court was also advised that the Appellant had been seen committing the offence on CCTV and some stolen items were seen at his place,

[7] which I take to be his place of residence. The court then proceeded to convict the Appellant on his own plea. By way of mitigation the Appellant tendered his apologies to the owner.

[8] <u>MITIGATION</u>

[9] In my view the further points in favour of the Appellant were that he was a first offender and had pleaded Guilty to the charges at the first opportunity.

[10] <u>SENTENCE</u>

[11] The Magistrate took into account that the victims were tourists and visitors to the Seychelles and held that this was an aggravating factor.

[12] He imposed a sentence of 10 years imprisonment in respect of charge 1 and 5 years in respect of charge 2 and ordered that the sentences be consecutive. Accordingly the total term of imprisonment was fifteen [15] years.

[13] It is against this conviction and sentence that the Appellant entered his appeal.

[14] Counsel for the Appellant at the hearing of the Appeal was cogniscant of section 309[1] of the Criminal Procedure Code but sought to maintain the appeal against conviction as well as sentence. I elected to consider the submissions in relation to conviction and sentence.

[15] GROUNDS OF APPEAL

[16] The grounds of appeal are set out in the Memorandum of Appeal and Mrs Amesbury also relied on her submissions in court. Counsel for the Prosecution replied. The Submissions form part of this record. Mrs Amesbury also brought to the attention of the Court the case of Raymond Tarnecki v The Republic [Criminal Appeal No 4 of 1996].

[17] It was submitted by Mrs Amesbury that at the time of the offence and conviction the Appellant was only 16 years of age and was thus a child in terms of section 92 of the Children Act. She produced in support the Birth Certificate of the Appellant. She stated that the age of the Appellant should have been taken into account by the Magistrate and the Prosecution required the instruction of the Attorney General before proceeding with the prosecution of the Appellant. There was no such instruction. She also highlighted the fact that before plea was taken the Appellant did not have access to advice from a legal representative or members of immediate family or a guardian.

[18] She also submitted that the phrase in the charge of burglary "in the early hours" was not consistent with the wording "at night" or "in the night" as set out in section 289 of the penal code.

[19] The final ground of the memorandum of appeal read as follows "The charge was also defective in that it charged two persons on the same indictment without making them

joint offenders. These were two distinct offences committed by two distinct persons and on different days".

[20] These points were all amplified in the oral submissions of Mrs Amesbury.

[21] Mr. Vipin for the Respondent submitted that no instruction from the Attorney General was required since the Appellant, a child, was charged jointly with an adult in terms of section 113[e] of the Criminal Procedure Code. Mr. Vipin accepted that we had no precise knowledge of the age of defendant Hollanda but asked that it be presumed that he was an adult. He submitted that his view was supported by a consideration of section 93 of the Children Act and both sections should be considered together. This section allows a child, when charged jointly with an adult to be dealt with in the adult court and not the juvenile court. Hence the Prosecution and conviction should stand.

[22] CONSIDERATION OF THE SUBMISSIONS and FINDINGS

[23] I have considered all the submissions both written and oral.

[24] I look firstly at the point regarding the wording in the burglary charge. There is no substance to this ground of appeal.

[25] Secondly, it was entirely proper that charges of burglary and stealing and receiving be included in the same charge sheet.

[26] I now look at the remaining points which, for convenience, can be taken together.

[27] A child is defined in the interpretation section of the Children Act and means a person under 18 years of age and includes a young person. There is an exception to the general rule but this refers only to sections 9 to 14 and hence to Affiliation Orders only.

[28] I find that the Appellant was 16 years of age on the date of the offence and on the date when the Court imposed the conviction and sentence. I refer to the Certificate of Birth Number 1167 of 1996.C issued by the Civil Status Officer and produced to the Court by

Mrs Amesbury which shows the date of birth of the Appellant to be is September 1996. The offences were committed on 23rd June 2013 and the Appellant was convicted on June 2013.

[29] In the earlier proceedings the Magistrate was not advised that this Appellant was 16 years of age. The Appellant did not so advice. The Prosecutor did not do so. The formal charge sheet does not record the age or date of birth of the Appellant. For that matter the charge sheet did not show the age or date of birth of the other defendant called Ronny Hollanda.

[30] The Magistrate proceeded in his normal way. He explained the constitutional rights to the defendant who stated that he wished to defendant himself. He elected to plead guilty to both charges and he agreed the brief facts. He mitigated on his own behalf. Thereafter he was convicted and sentenced. In view of the paucity of information it is understandable why the Magistrate took the view that he had received unequivocal pleas and proceeded accordingly.

[31] However it is now known that on the date the Appellant appeared in the Magistrates Court he was 16 years of age. No doubt if this had been known to the Magistrate, he may have considered adopting a different approach. Even at this stage I do not know the age of the other defendant, Hollanda. It is not shown on the charge sheet and Counsel for the Respondent was unable to give me this information in court.

[32] I refer to Section 92 of the Children Act. It is as follows "No child shall be prosecuted for any offence…" except- :

a. The offence of murder or an offence for which the penalty is death; or

b. On the instructions of the Attorney General.

[33] Hence, discounting the special cases mentioned in subsection [a] no child shall be prosecuted unless the prosecution is instructed by the Attorney General. In my view that means the written instruction of the Attorney General. Similar wording is sometimes used, for example, *"with the consent of the Attorney General"*. The import of such phrasing is that the written sanction or approval of the Attorney General is a pre-condition to certain classes of prosecution.

[34] Counsel for the Respondent referred me to section 113[e] of the Criminal Procedure Code. This allows a charge sheet to include charges of burglary and Stealing and a charge of receiving stolen property. This merely sets out a procedure which is in common use whereby charges based on the same facts or continuing circumstances can be brought in the same information or charge sheet. Charges of stealing and receiving are often found on the same charge sheet with the same or different defendants. Section 112 of the Criminal Procedure Code provides as follows: *"Any offences, whether felonies or misdemeanors may be charged together in the same charge or information if the offences charged are founded on the same facts or form, or are part of a series of offences of the same or similar character"*. Similarly section 93 of the Children Act is procedural in nature. A child charged alone is dealt with in the juvenile court. A child charged jointly with an adult can be dealt with in the adult court.

[35] I find that the Appellant was 16 years of age when he appeared in court to answer the two charges. He was a child in terms of section 92 of the Children Act. The Prosecution required the prior written instruction of the Attorney General before proceeding with this prosecution. There was none. The Prosecution did not seek an adjournment to obtain this instruction. I take into account the precise wording of section 92, *"No child shall be prosecuted for any offence."*. In my opinion these words mean exactly what they say. Mr. Vipin has produced no authority in support of his submission that a child charged jointly with adult is in a different position to that of a child charged alone. I see no reason why there should be any difference. Section 113[e] of the Criminal Code and section 93 of the Children Act are procedural and reflect common practices and do not assist the Respondent.

[36] Section 92 of the Children Act is quite clear; it means exactly what it says. In the present matter the prior written instruction of the Attorney General was required for the prosecution of the Appellant. No such instruction was obtained by the Prosecution.

[37] I refer to the final sub-paragraph of paragraph 1-286 of Archbold 2012 which reads as follows, "Where some consent that is required to the institution of proceedings is not obtained, the whole of any trial that takes place, including committal proceedings, is a

nullity and a conviction which occurs in such circumstances will be quashed". In the present matter the proceedings in the magistrate's court were a nullity.

[38] According this appeal against conviction and sentence succeeds. The conviction is quashed and the sentence set aside. The Appellant is discharged.

Signed, dated and delivered at Ile du Port on 18 November 2013

C McKee
Judge of the Supreme Court