

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 52/2012

Appeal from Magistrates Court decision 31/2012

[2014] SCSC 16

ZERA MANCIENNE

Appellant

versus

THE REPUBLIC

Heard:

Counsel: Mr Basil Horeau and Mr Chetty for appellant

Mr. Kumar Assistant State Counsel for the Republic

Delivered:

JUDGMENT

McKee J

The Appellant, Ms Zera Mancienne appeals against Sentence. The Appellant was charged with the offence of entering a building to commit a felony therein namely Stealing contrary to section 290 of the Penal Code.

The Particulars of the offence were as follows:

[1] Zera Mancienne, unemployed, residing at La Pointe, Praslin, on the 13th day of May 2012 entered into a chalet at Anse Saint Sauveur, Praslin, with intent to commit a felony

therein, namely stealing.

[2] The Appellant pleaded not guilty to the charge and the matter went to trial. She was represented by Mrs Amesbury. At the conclusion of the trial the Magistrate adjourned the matter for judgment, which was delivered on 26th October 2012. The Appellant was found Guilty and convicted of the charge. On this appearance the Appellant did not have the benefit of representation.

[3] Prior to sentence the Magistrate asked the Prosecutor whether the Appellant had any previous convictions. No formal record of previous convictions was produced to the court and the prosecutor merely asked the court to take judicial notice that the Appellant had a previous conviction. The Magistrate raised this matter with the Appellant who confirmed that she did have a previous conviction for a similar offence for which she had been sentenced to imprisonment for a period of two years. No other details were given nor the date of this conviction. The Appellant made no submission in mitigation. The Magistrate adjourned for sentence. On 31st October 2012 the Magistrate gave his Reasons for Sentence. He stated that the Appellant had been convicted of a similar offence in the year of 2009 and referred to the mandatory minimum sentencing provisions for this offence. Under the provisions he was of the view that the Appellant could face a possible sentence of ten years imprisonment. However he took into account the findings in the appeal case of Frederick Ponoo and imposed a reduced sentence of six years imprisonment.

[4] The Appellant now appeals against the sentence of six years imprisonment.

SUBMISSIONS.

The submission by Mr Chetty for the Appellant was simply that the sentence was harsh and excessive. The Magistrate, while acknowledging that the minimum mandatory sentence provisions applied, had stated that he took an individualistic approach to sentencing in line with the findings in the Ponoo case and hence imposed the reduced sentence. However Mr Chetty still sought a reduction of sentence.

Mr Kumar for the Respondent supported the sentence imposed. He submitted that the Appellant had been convicted within a period of five years from this present conviction for the same or similar offence. As a result it was appropriate that the Magistrate take cognisance of the minimum mandatory sentencing provisions.

FINDINGS

In respect of this appeal I have considered the Notes of Proceedings, the Reasons for Judgment, the Reasons for Sentence and Submissions.

I would like firstly to focus on the record of proceedings immediately after the Magistrate read out his judgment dated 26th October 2012. He enquired as to any possible previous conviction relating to the Appellant. The prosecutor was unable to produce, in line with normal procedure, a Certificate of Previous Convictions which is prepared by the Criminal Record Office of a police force. I refer to section 119 of the Criminal Procedure Code of Seychelles, which has the marginal explanatory note, “Mode of proof of previous conviction or acquittal”. In particular, I refer to section 119[2] of the Code which reads “A certificate issued under the provisions of section 27[4] the Police Force Act shall be *prima facie* evidence of all the facts therein set forth”. In the present matter the prosecutor was not in possession of a said certificate and moved the court to take judicial notice that [the Appellant] Ms Zera Mancienne has previous conviction. In the absence of information to the contrary I conclude that the Magistrate did proceed on this basis. He questioned the Appellant on this topic and elicited from her the following information; she had been convicted of a criminal offence before, for the same offence as the present one and that she had been sentenced to a period of two years imprisonment. During this exchange neither the precise charge nor the exact date of the offence were mentioned in open court. This date is not shown in the typewritten or handwritten notes of the Magistrate. However in his Reasons for Sentence delivered some five days later on 31st October 2012 at line 2 the Magistrate states “The accused was convicted and sentenced to prison for two [years] in 2009 for the same offence which she does not dispute”. Up to this point the date, neither the day, month or year, of the prior offence is recorded in the Notes of Proceedings. I am led to infer that during the intervening five days the Magistrate may have used his own knowledge or carried out some private enquiry to confirm, at least, the year of the previous conviction.

In my opinion the Magistrate was ill-advised to take up the suggestion of the prosecutor that he should take judicial notice that the Appellant had a previous conviction. A court may take judicial notice of certain matters but these are normally matters such as, for example, lighting conditions on a particular piece of road, the location of a church, school or public house and like issues, which are known to the general public and are in the area where the judge or magistrate lives or works. A court can also take judicial knowledge of public statutes, constitutional matters, territorial limits, territorial areas, official gazettes and the currency of a particular country. I can find no authority which suggests that a court can take judicial notice of a previous conviction of a particular accused in a particular case.

Archbold [2012 edition] on Judicial Notice at paragraph 10-71 states “Courts may take judicial notice of matters which are so notorious, or clearly established, or susceptible of demonstration by reference to a readily obtainable and authoritative source that evidence of their existence is unnecessary;”. Further on in the paragraph “ The doctrine applies not only to judges but also to juries with respect to matters coming within the sphere of their everyday knowledge and experience”. And again in the paragraph “Although judges and juries may, in arriving at their decisions, use their general information and that knowledge of the common affairs of life which men of ordinary intelligence possess, they may not act on their own private knowledge or belief regarding the facts of the particular case”.

The Magistrate strayed into error in taking the route he did with regard to proof of the previous conviction of the Appellant. In my opinion, the proof of a previous conviction should not be considered under the principle of Judicial Notice. It is important that a previous conviction is proved in the correct manner where the minimum mandatory sentencing provisions could possibly apply since under the provisions a repeat offender can face a greatly enhanced sentence in comparison to a first offender.

Where the prosecution wish to rely on a previous conviction the way is clear. It must ensure that it has a Certificate of Previous Convictions in the prescribed form available when there is a prospect after a conviction that the minimum mandatory sentencing provisions may or will apply.

Details of the Provisions of antecedents to the Magistrates Courts in England under Practice Directions can be found in Archbold at paragraph 5-75, paragraph III.27.8. “The magistrates’ courts antecedents will be prepared by the police and submitted to the CPS [Crown Prosecution Service] with the case file”.

In the present case the Magistrate ought to have considered adjourning the case for the production of a certificate of previous convictions relating to the Appellant. He did not do so. As a result I find that it has not been proved to the required standard that the Appellant had a previous conviction for the same or a similar offence. In my view the Magistrate’s formula for calculation of sentence is not sustainable.

In the light of the above finding I look afresh at the circumstances of the offence and possible sentence.

The date of the offence was 13th May 2012. The date of conviction was 26th October 2012. The latest amendment to the minimum mandatory sentencing provisions came into force on 30th July 2012. These provisions have no retrospective effect and hence the Appellant is sentenced according to the law at the date of the offence, 13th May 2012. Section 290 of the Penal Code is in Chapter XXIX of the Code. Since any previous conviction has not been proved I take the Appellant as a first offender. Section 27 of the penal code which was operative on 13th May 2012 prescribed no minimum mandatory sentence for a first offender who was convicted of an offence punishable with imprisonment for seven years.

Consequently I look to section 290 of the penal code on the matter of sentence. The offence occurred during the hours of daylight. This Appellant is liable to a possible sentence of up to seven years imprisonment.

I look at the circumstances of the offence. The Appellant had the effrontery to secret herself in the holiday chalet which the occupants vacated for the day. It is unclear how she obtained entry. She was discovered by Ms Rosemary Cresswell when she entered to clean the room. The Appellant had tried to evade detection by hiding under the bed. On discovery she made good her escape but was arrested shortly afterwards.

She pleaded not guilty to the offence. She sought to test the evidence of the prosecution as is her right but by doing so lost any benefit she may have accrued by entering a plea of guilty. A disturbing piece of evidence is found in her cautioned statement where she refers to smoking marijuana. I find that it reasonable to infer that she was in the chalet to steal in order to finance her dangerous drugs habit. In my view there has to be a strong element of deterrence in the sentence.

CONCLUSION

In the result I allow the appeal against sentence and quash the order of the Magistrate that six years imprisonment be imposed. In its place I substitute an order that a term of five years imprisonment be imposed on the Appellant.

Signed, dated and delivered at Ile du Port on

C McKee
Judge of the Supreme Court