

**IN THE SUPREME COURT OF SEYCHELLES**

**Criminal Side: CN 10/2014**

**Appeal from Magistrates Court decision 147/2013**

**[2014] SCSC**

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**MARCEL DAMIEN QUATRE**

Appellant

versus

**THE REPUBLIC**

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Heard:

Counsel:

Mr. Nichol Gabriel Attorney at Law for Appellant

Mr. Hemanth Kumar, Assistant Principal State Counsel for the Republic

Delivered:

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**JUDGMENT**

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**Akiiki-Kiiza J**

- [1] This is an appeal from the decision of Magistrate, Kisnan Labonte, dated the 14<sup>th</sup> day of January 2014. The Learned Magistrate sentenced the appellant to 12 years imprisonment.
- [2] The Appellant had been charged on 3 counts of housebreaking contrary to Section 289(a) of the Penal Code Act and punishable under the same section. He pleaded guilty to the charge and was convicted on his plea of guilty.
- [3] The appellant is appealing against sentence only.

[4] The grounds for this appeal are in the appellant memorandum of appeal and are as follows:

(a) The sentence imposed by the Learned Magistrate is manifestly harsh, excessive and wrong in principle.

(b) The sentence of 12 years imposed by the Learned Magistrate was in excess of his jurisdiction.

(c) The sentence of 12 years imposed by the Learned Magistrate does not correspond or conformed to the pattern of sentencing in cases of similar nature.

[5] In the premises therefore, the appellant is praying to this court to quash the sentence imposed by the Learned Trial Magistrate, and substitute it with an appropriate one.

[6] The brief background of the case, as can be gathered from the lower court's record, are as follows:

The appellant first appeared before the Learned Trial Magistrate on the 7<sup>th</sup> May 2013. On that day the court explained the appellant's Constitutional rights and he opted for legal aid. The matter continued to be mentioned until 10<sup>th</sup> October when the accused took his plea. He pleaded not guilty on all 3 counts and the matter was then fixed on the 14<sup>th</sup> January 2014. On that day the appellant changed his plea on the 1<sup>st</sup> count from not guilty to guilty; whereupon the prosecution withdrew the 2<sup>nd</sup> and 3<sup>rd</sup> counts under the provisions of Section 145 of the Criminal Procedure Code. (I will comment on this provision later on in my judgment).

Thereafter the facts were read on and Mr Bonte, his counsel, admitted them on his behalf as being correct. The Learned Magistrate thereafter convicted the accused on the 1<sup>st</sup> count. Mr Bonte also admitted the past record of the accused. After mitigation the Learned Trial Magistrate sentenced the accused to 12 years

imprisonment. The appellant being dissatisfied with the sentence he appealed to this court, hence this appeal.

[7] In Seychelles the law regarding sentencing is no longer in doubt. However, one of the relevant factors to be taken into consideration by the court, amongst others, is the seriousness of the offence. (see the case of **LABICHE VS REPUBLIC, SCA NO. 1(A) OF 2004**). In **MATHIOT VS REPUBLIC SCA NO. 12 OF 2000**, it was stated that as a general principle an appellate court will not interfere with the discretion of a trial court, merely because the appellate court would have reached a different decision. An appellate court will usually interfere with the sentence imposed by the trial court only in the following circumstances.

- (a) That the sentence was harsh, oppressive or manifestly excessive.
- (b) The sentence was wrong in principle.
- (c) The sentence was far outside the discretionary limits of the court.
- (d) A matter had been improperly taken into consideration, or a matter that should have been taken into consideration was not; or
- (e) The sentence was not justified in law.

[8] It appears in this appeal, the appellant is relying on the first two grounds. The decision in **Labiche** and **Mathiot** cases were recently cited with approval by the same Court of Appeal in the case of **LIVETTE ASSARY VS REPUBLIC SCA NO. 18 OF 2010**. My task at hand is to determine whether the appeal falls within any of the above categories of breach by the trial court to warrant my interference with the 12 year sentence imposed by the lower court.

[9] I will follow the order of submission adapted by Mr Gabriel the Learned Counsel for the appellant at the hearing of the appeal. He first argued the 2<sup>nd</sup> ground first regarding the excess of jurisdiction by the Learned Trial Magistrate. According to the lower courts

record Mr Labonte signed as “K. Labonte (Mr), then Magistrate”. In the Magistrate Court of Seychelles there are two categories of Magistrates, that of a Senior Magistrate and a Magistrate. Hence Section 2 of the Criminal Procedure Code defines a Magistrate as including a Senior Magistrate. It goes further and states that a Magistrate’s court means a court presided over by a Senior Magistrate or a Magistrate.

[10] The jurisdictional powers of these courts of the Magistrate is to be found in Section 6(1) of the Criminal Procedure Code. This section was however recently amended by Act 4 of 2014, whereby the Senior Magistrate jurisdiction was enhanced to imposed any sentence authorised by law provided:

*“such a sentence does not exceed 25 years and a fine of R250,000”.*

As for a Magistrate, he can impose “*a sentence not exceeding 18 years and a fine of R125,000*”. (see section 6(1) and 6(2) of the Criminal Procedure Code).

[11] However, before this amendment came into force, the maximum sentence powers to be imposed by the Senior Magistrate was 10 years and a Magistrate 8 years and a fine of R100,000 and R75,000 respectively. The appellant committed the offence on the 23<sup>rd</sup> August 2012, 2 years prior to the amendment of the Criminal Procedure Code by Act 4 of 2014. Hence this case is governed by the old Act which was in force as of 31<sup>st</sup> July 2011.

[12] The trial Magistrate in this case imposed a sentence of 12 years on the 14<sup>th</sup> January 2014. This was clearly over and above the powers given to him by section 6(2) of the Criminal Procedure Code before the amendment in 2014. This was contrary to the provisions also of Article 19(4) of the Constitution of Seychelles.

[13] I will only quote the relevant part for our purposes only from Article 19(4) of the Constitution:-

*“a penalty shall not be imposed for an offence that is more severe in degree or description than the maximum penalty that might have been imposed for the offence at the time when it was committed”.*

[14] Hence the sentence of 12 years imposed by the Learned Trial Magistrate is *ultra vires* the provisions of Article 14(4) of the Constitution of this Republic. However, it appears the sentence imposed by the Learned Magistrate was not a nullity but subsisted till it could be set aside by an appellate court. This appears to be the view of my learned brother Justice McKee in the case of **Hendrick Jouaneau vs Republic, {2013} SC at page 3** where he cited with approval and applied the House of Lords decision in **R vs Cain AC46 House of Lords**. I am also persuaded by the same authority and I follow him.

[15] In the premises I find the second ground of appeal succeed and the sentence of 12 years is quashed and set aside.

[16] Mr Gabriel’s second attack on the trial Magistrate’s sentence regards what he called harshness and excessive. To some extent I agree with him in the sense that it was in excess of what the law permitted the Magistrate to impose, as he imposed 12 years instead of the maximum 8 years imprisonment.

[17] However, if I understood Mr Gabriel well he goes further to state that even the 8 years allowed by Section 6(2) of the Criminal Procedure Code is too harsh given that the appellant had pleaded guilty, hence saving the court’s time and resources and therefore deserved a reduction even on the 8 years. He suggested a term of 4 years imprisonment as appropriate.

[18] Before a court imposes a sentence to a convicted accused person, it considers, amongst other things, the following:

(a) The nature of the offence.

(b) The circumstances of the commission of the offence,

- (c) The personality of the accused person.
- (d) The age of the accused person.
- (e) The value of the property stolen; if applicable.
- (f) The prevalence of the similar cases in the area.
- (g) The previous record if any of the accused.
- (h) The interest of the public in protecting it from such crimes, etc...

[19] While passing the 12 year sentence, the Magistrate in this case had the following to say:

*“I have considered the guilty plea of the accused and the mitigation of counsel and I sentence the accused to 12 years imprisonment...”*

[20] In mitigation, the accused is said to be 24 years old and was serving a total 23 years imprisonment. He prayed for leniency due to his age and that he was remorseful.

[21] The prosecution simply pointed that accused had a previous record. That is all it said. The maximum sentence under Section 289 of the Penal Code Act, is 10 years imprisonment. As already found herein above, the trial Magistrate could not exceed 8 years by virtue of section 6(2) of the Criminal Procedure Code. This means the maximum he was allowed by law to impose is 8 years. Noting that the appellant had admitted serving 23 years as his past record as per the Prosecution List which was supplied to the court and 13 of these previous convictions related to housebreaking and theft, it is my conviction that with such record, the appellant cannot expect to benefit from a reduction of sentence even if he had pleaded guilty. He appears not to be repentant and a menace to the public. He therefore merits to be kept out of the public domain for some more time.

[22] All in all, I find that the appeal succeeds.

[23] I accordingly quash the sentence of 12 years imposed on him and substitute 8 years imprisonment.

Order accordingly.

**D. AKIIKI-KIIZA**

**JUDGE**

Dated this 25<sup>th</sup> day of June 2014

Before I take leave of this case I would comment on the mode of taking and recording pleas of guilty by the Magistrates. My limited research, in a short time I have spent in this jurisdiction, it has come to my notice that the Trial Magistrate appears to allow counsel for the accused persons to accept facts as narrated by the Prosecution on behalf of the accused person instead of the accused himself accepting the facts as narrated. This in my considered view is improper, as the accused person is the one who is taking the plea not his advocate. This is borne out in the wording of Section 181 of the Criminal Procedure Code which provides as follows:-

*(1) The substance of a charge or complaints shall be stated to the accused person by the court and he shall be asked whether he admits or denies the truth of the charge.*

*(2) If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words used by him.*

This does not extent his counsel. In a similar manner, the accused should be the one to accept or challenge any facts read to him by the prosecution as he is the one who was present at the scene at the time of the crime and not his advocate.

Perhaps guidance could be got from the persuasive authority of the East African Court of Appeal in the case of **ADAN VS REPUBLIC [1973] 1 EAST AFRICAN LAW REPORT at 445.**

In that case their lordships laid down the manner of recording and the steps to be taken while dealing with pleas of guilty. **Justice Spry, Vice President**, who read the court's judgment, whose, coram included Sir William Duffus (President) and Mustafa JA, had the following to say.

*“When an accused person is charged, the charge and the particulars should be read out to him. The Magistrate should therefore explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all these essential ingredients, the Magistrate should record what the accused has said as nearly as possible in his own words and then formally enter plea of guilty. The Magistrate should then ask the prosecutor to state the facts of the alleged offence, and, when the statement is complete, should then give the accused an opportunity to dispute or explain the facts or add any relevant matters or facts. If the accused does not agree with the statement of the facts or asserts additional facts which, if true, might raise a question as to his guilt, the Magistrate should record a change of plea to not guilty; and proceed to hear the trial. If the accused however does not deny the alleged facts in any material respect, the Magistrate should record a conviction and proceed to hear any further facts relevant to the sentence.. The statement of facts and the accused's reply must of course be recorded”.*

What is important to note is what the accused's reply to the facts is and not that of his advocate. This landmark case has been followed through East African jurisdictions since 1973 and perhaps it could be a good guide to the Magistrates in this jurisdiction.

Another aspect which I have noted from a number of cases handled by the Magistrates tend to allow a withdrawal of other counts soon after an accused has changed his plea from not guilty to guilty. This is purported to be done under section 145 of the Criminal Procedure Code. A careful reading of section 145 of the Criminal Procedure Code however reveals that withdrawal should come **after** the accused **had been convicted** but not before.



This section enacts as follows:

*“145 – where there are more charges than one against the same accused and he **have been convicted** of one or more of them, the person conducting the prosecution, may, with the consent of the court, withdraw the charges”.* Hence, it is irregular to withdraw before a conviction.

A copy of this judgment should be served on the Attorney General and the Magistrates Court.

**D. AKIIKI-KIIZA**

**JUDGE**

Dated this 25<sup>th</sup> day of June 2014