

**IN THE SUPREME COURT OF SEYCHELLES**

**Criminal Side: CN 30/2014**

**Appeal from Magistrates Court decision 153/2014**

**[2014] SCSC**

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Appellant **FREDDY ESPARON**

versus

**THE REPUBLIC**

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Heard: 17 July 2014

Counsel: Ms Lucy Pool for appellant

Mr Ananth Subramanian, Attorney General for the Republic

Delivered: 21 July 2014

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**JUDGMENT**

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Akiiki-Kiiza J

[1] This is an appeal from the decision his Worship K. Labonte a Magistrate in the Magistrate's Court 'C' dated the 14<sup>th</sup> of March 2014; wherein he convicted the Appellant on his own plea of guilty on two counts and sentenced him to 5 years imprisonment on first count and the four months imprisonment on the second count. He ordered the sentences to run concurrently.

[2] The first count was stealing contrary to section 260 and 264 (a) of the *Penal Code Act* and the second count was resisting arrest contrary to section 238 (b) of the same Act. The Appellant raised the following grounds of appeal.

1. The sentences passed by the learned Magistrate was wrong in principle.
2. The sentence passed was wrong and that the accused being unrepresented was unable to put forward mitigating factors which would have in the circumstances of the case altered the nature of the sentence passed on him towards the lenient sentence.
3. The sentence passed by the learned Magistrate was manifestly harsh and excessive in all circumstances of the case. He therefore prayed for setting aside the sentence or reduced sentence.

[3] The brief facts of the cases as can be gathered from the Law of Courts Record appear to be as follows. The Appellant on the 13<sup>th</sup> of March 2014 at Victoria House Arcade snatched the wallet from the hand of the victim Mr Marcus Drebler that the wallet contained cash in various currencies and the victim's personal documents. This was the basis for the first count. On the second count he was charged with resisting arrest in that on the same day and time, while at 5<sup>th</sup> Avenue he resisted arrest by SI Jeanette Georges a police officer whilst in due execution of her duty. When the Appellant was produced before the learned trial Magistrate he plead guilty to both counts and was convicted and sentenced 5 years imprisonment on the first count and four months imprisonment on the second count. Both sentences run concurrently. The Appellant being dissatisfied by the above sentences appealed to this Court. During oral submissions Ms Lucie Pool appeared for the Appellant and Mr Ananth appeared for the Republic/Respondent.

[4] It is now settled that an Appellant Court will not interfere with the sentence imposed by trial Magistrate merely because had it been the trial Court it should have imposed a different sentence. **(See the case of DINGWALL VS R (1963-1966) S.L.R 205.** The Appellant Court therefore can only interfere with the sentence imposed by the trial Court in the following circumstances:-

- (a) The sentence was harsh, oppressive and manifestly excessive.

- (b) The sentence was wrong in principle.
- (c) The sentence was far outside the discretion limits of the Court.
- (d) Where the matter had been improperly taken into account by the trial Court or where the matter which should have been taken into account was not taken into account by the trial Court.
- (e) Where the sentence imposed was not justifiable in law. **See the case of MATHIOT VS THE REPUBLIC, Seychelles Court of Appeal No 12/2000).**

[5] I propose to follow the same order of arguments put forward by the learned counsel for the Appellant Ms Pool. What I can gather from her oral submission is the following:

- (a) That the learned trial Magistrate did not adequately explain to the Appellant of the consequences of a plea of guilty especially as the Appellant was unrepresented.
- (b) Secondly that the accused did not put forward any mitigating factors in an adequate manner, thereby being sentenced to a heavier sentence.
- (c) Lastly, that the sentence of five years imprisonment was manifestly harsh and excessive in the circumstances of the case.

[6] As for the alleged failure of the learned trial Magistrate to adequately explain the rights of the Appellant and the consequences thereof of pleading guilty, she cited the case of **DERECK VEL VS THE REPUBLIC Supreme Court of Seychelles CA 19/08**. In that case my learned brother Honourable Justice Gaswaga ordered a re trial where the Magistrate never appeared to explain the consequences of guilt plea to an unrepresented accused person. The record in that case clearly shows that the learned trial Magistrate had a defense counsel when the plea was first taken and the accused had pleaded not guilty. But when the counsel was absent on a subsequent date the case was in Court, the accused chose to plead guilty and was subsequently convicted and sentence to 3 years imprisonment. The lower Court record never reflected that the Magistrate had informed

the accused of his constitutional rights or rights to have legal representation. In the instant case however, the lower Court record contains the following proceedings:-

**“14.03.14**

**Mr Revera for the Republic –Present**

**Accused –Present**

**Constitutional rights to legal representation put to the accused in Creole.**

**Accused:- Shall defend case self.**

**Court to accused:- If convicted will be sent to prison. Advice to have Legal Aid.**

**Accused:- I understand. Defend self. Do not want to waste the Court’s time.**

**Charge put to the accused in Creole.**

**Accused: Count 1. Guilty.**

**Count 2. Guilty.”**

- [7] Thereafter, facts were read out to the Appellant who admitted them as correct. The Magistrate then convicted the Appellant. It is my considered view that in the above circumstances the learned trial Magistrate cannot be faltered in the procedure he adopted. Unlike in the case before Honourable Justice Gaswaga, Mr. Labonte in this case took all the necessary precautions and advised the Appellant of his rights and need for representation before he even read out the charge to him. Throughout the accused said that he will defend himself. The learned trial Magistrate went further and informed the Appellant that if he is convicted he will go to prison and again advised the Appellant to get Legal Aid. But the accused confirmed that he fully understood but decided to defend himself and not to waste Court’s time. The Magistrate in my view took all the necessary precautions pointed out by his Lordship Allcar Chief Justice in the case of **RALPH ETHEVE VS THE REPUBLIC Supreme Court of Seychelles 15/06**. The learned

Chief Justice stated as follows: “ *I believe that in every case where a legally unassisted person appears before Court and wishes to tender a plea of guilt to an offence the presiding officer is under a duty to inform the person about the consequences of that plea especially if he is minded to impose a custodial sentence or if there are other mandatory sanctions that will necessarily follow. Moreover, a similar duty is cast upon a judicial officer to enquire whether or not there are any special reasons for not imposing a mandatory sentence*”.

[8] As I have already pointed out, the learned trial Magistrate in the instant case conformed fully with the necessary procedures while taking a plea of guilt. Hence, the case is distinguishable from the **DERECK VEL** case before Justice Gaswaga. In the premises therefore, Ms Pool’s submission in this regard fails.

[9] As to whether the trial Magistrate had considered the mitigating factors in favour of the Appellant or not; the record shows the following:-

**“Court: I convict accused on count 1 and 2 as charged.**

**Prosecution: He has previous convictions.**

**Accused: I admit the previous conviction**

**Mitigation: I have a wife who is pregnant. Pray for a lenient sentence. I am ready to pay any compensation imposed. I have pleaded guilty. Remorseful. I seek forgiveness”.**

[10] It is my considered view that the Appellant made reasonable submissions regarding mitigation of the sentence. I do not know what else could the Magistrate be reasonably expected to do if he has to avoid descending into the arena and risk being dubbed a defense counsel.

[11] As to whether the learned trial Magistrate took these mitigation factors into consideration while passing of the sentence is another issue altogether. It appears he did not do so. The record shows as follows:

## SENTENCE

- [12] “ I have considered the guilt plea of the accused person. I note that accused has previous convictions for stealing and had served various periods at the prison. The charges against the accused are serious offences especially the first count, stealing from a tourist. For such offences accused should not be treated leniently. He must undergo a longer term of imprisonment than those he had previously served”.
- [13] Thereafter, the learned Magistrate sentenced the Appellant 5 years imprisonment on the first count and 4 months imprisonment on the second count.
- [14] A careful perusal and consideration of the learned trial Magistrate’s reasons for imposing the respective sentences especially on the first count reveals that it was prosecution oriented. He never gave much thought about the mitigating factors put forward by the Appellant who had pointed out that he had a pregnant wife, that he was ready to compensate victim, that he was remorseful, that he had pleaded and wanted leniency from the Court. It appears all these were ignored by the learned trial Magistrate as they are not featured among the reasons he considered before imposing the sentence of 5 years imprisonment on the Appellant. This omission on his part falls within one of the principles which permit the Appellant Court to interfere with a trial Court’s sentence, namely the trial Magistrate failure to take into consideration matters which he should have taken into account while passing the impugned sentence. **(see MATHIOT’S Case above)** Had he considered the mitigating factors put forward by the Appellant in his mitigation he might have imposed a different sentence.
- [15] Ms Pool also submitted to the effect that the Magistrate sentence was unduly influenced by the victim, Mr Marcus Drebler, a German, being described as a tourist. However, she wondered where the learned Magistrate got that information from. It appears this is a sound observation. The Prosecutor soon after the accused had been convicted on his plea of guilt, simply pointed out to the Court that the Appellant had previous convictions. The charge sheet which was read to the accused never described Mr Marcus Drebler as a tourist but only as a visitor. It was also Ms Pool’s contention that a tourist is not an aggravating factor under the *Penal Code Act*. After a careful perusal of the record and the law applicable I am persuaded that the learned trial Magistrate this time took into

consideration matters which he should not have taken into consideration when he was sentencing the accused by describing the victim as a tourist hence in his view an aggravating factor. In his own words he said: *“The accused should not be treated leniently, he must undergo a longer term of imprisonment”*. By saying so the learned trial Magistrate relied on non existing evidence to increase the sentence imposed on the Appellant. (*see again MATHIOT’S case as above*).

**[16]** The next question for my determination is whether the sentence of 5 years imprisonment imposed by the learned trial magistrate was excessive or harsh in the circumstances of this case. Mr Ananth, the learned counsel for the Republic, submitted to the effect that given the maximum punishment for a person charged under section 260 and 264 (a) of the *Penal Code Act* being 10 years imprisonment, is not harsh or excessive. He therefore prayed that this Court maintains the same sentence. Ms Pool on her part had prayed for a reduction thereof.

**[17]** After, careful consideration of all the legal arguments from both sides and a careful perusal of the lower Court’s record, I am of a view that had the learned trial Magistrate considered all the mitigating factors put forward by the Appellant and at the same time he had not been unduly influenced by none existing evidence describing the complaint as a tourist, a factor which reduced the Appellant’s chances of getting a lenient sentence from Court, I am convinced the learned Magistrate might have imposed a different sentence from the one of 5 years imprisonment. All in all find that the appeal succeeds in parts as follows:-

**(a)** The first and third grounds of appeal succeed.

**(b)** The second ground of appeal fails.

Consequently I make the following orders.

**ORDER**

- (a) The sentence of 5 years imposed by the trial Magistrate is set aside and is substituted with three and a half years imprisonment on the first count.
- (b) The sentence on the second count remains intact.
- (c) The sentences to run concurrently. Order accordingly.

Signed, dated and delivered at Ile du Port on 21 July 2014

D Akiiki-Kiiza  
**Judge of the Supreme Court**