IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 3/2014

Appeal from Magistrates Court decision 570/2011

[2014] SCSC

ALEX SERRET

Appellant

versus

THE REPUBLIC

Heard: 18 July 2014

Counsel: Mr Nichol Gabriel for appellant

Mr Georges Robert, Attorney General for the Republic

Delivered: 24 July 2014

JUDGMENT

Akiiki-Kiiza J

[1] This is an appeal against both conviction and sentence. The Appellant was found guilty and was convicted upon his own plea of the offence of breaking and entering into a building and committing a felony therein Contrary to Section 291 (a) of the Penal Code Act. He tried by K. Labonte, a Magistrate at the Magistrate Court, Mahe.

[2] He was subsequently sentenced to a term of 10 years imprisonment.

[3] In his memorandum of appeal dated the 4th of July 2014, the Appellant raised the following grounds:-

(A) <u>Against conviction</u>

1. That the Appellant did not appreciate the nature of the charge against him and pleaded guilty on a misapprehension of the law and the facts.

2. That the Appellant having been charged with a second accused for the same offence did not benefit from the lesser sentence imposed on the co-accused after the charge was amended.

(B) <u>Appeal against sentence</u>

1. That the sentence imposed by the learned Magistrate is manifestly harsh, excessive and wrong in law and principle.

2. That the sentence of 10 years imposed by the learned Magistrate was in excess of his jurisdiction.

3. That the learned magistrate failed to consider an alternative sentence les than 10 years in the view that the Appellant did not break into the building as specified in section 291 (a) of the Penal Code Act.

[4] In the Premises therefore the Appellant prayed for the quashing of the conviction and sentence imposed on the Appellant by the learned trial Magistrate.

[5] At the hearing, Mr Gabriel who appeared for the Appellant and Mr Robert represented the Republic/Respondent.

[6] I will start with the grounds of appeal raised in respect of the conviction.

(a) That the Appellant did not appreciate the charge against him and pleaded guilty on a misapprehension of the law and facts. According to Mr Gabriel, as I understood him, the Appellant was charged with Breaking into a building contrary to Section 291 (a) of the Penal Code Act but that the particulars of the offence talked a “kiosk” instead of a building within the meaning of that section. That a “kiosk” is not mentioned in section

291 (a) of Penal Code Act, hence in his view though the statement of offence was correct, the particulars were not in conformity with the statement of the offence due to the description of the place where the Appellant broke in as "kiosk".

[7] On the other hand, Mr Robert the learned counsel for the Republic/ Respondent submitted to the to the effect that a "kiosk" was a building in the sense that it has walls and a roof and shutters which are closed hence keeping the merchandise sold therein safe. Hence, it could be described as a building within the meaning ascribed by Section 291 (a) of the Penal Code Act.

[8] Section 291 (a) of the Penal Code Act enacts as follows:-

[9] "291. Any person who:-

(a) breaks and enters a schoolhouse, shop, warehouse, store, office, or counting- house, or a building which adjacent to a dwelling house, garage, pavilion club, factory, workshop, and occupied with it but is not part of it, or any building used as place of worship and commits a felony therein;

(b) is guilty of a felony and is liable to imprisonment for 10 years.

[10] The question for my determination here is whether a "kiosk" is a "building" within the meaning of Section 291 (a) of the Penal Code Act.

[11] **Chambers 21st Century Dictionary Revised Edition of 1999** defines a building as :-

" a structure with walls and a roof, such as a house."

The same dictionary defines a "kiosk" as follows:

" a small roofed and sometimes movable booth or stall for sale of sweets, newspapers, etc…"

[12] **ARCHBOLD 2014 EDITION; 21-115** while defining a building states as follows:

"*The word 'building' being an ordinary word of English language and the context not being such as to show that the word is used in an unusual sense, its meaning is a question*

of fact not of law; It is for the tribunal of fact (in our case here the court) to decide whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of English language apply to the facts which have been proved."

[13] What is of significance in the above quoted extract from **ARCHBOLD**, is that an English word, should be given its natural and ordinary meaning and that its meaning is a question of fact to be decided by the Court as a matter of ordinary usage on the facts which have been proved for it.

[14] In the instant case, the facts which have been proved before the trial Court are that there was a breaking into a "kiosk" by the Appellant, and stole from there various items of considerable value, including a makette boat valued at SR40,000/-, eight wooden plates valued at SR 2000/-, seven ornament plates on stand valued at SR 7,000/-, seven hats valued at SR 700/-, and cash 300 dollars as well as cash SR 2, 8000/-.

[15] It goes without saying that such valuable items had not been left in the open. They must have been secured in a safe and strong structure which must have been locked up before it was broken into by the Appellant.

[16] In my view such structure must of necessity have walls, roof, floor and doors. Given the items stolen from the "kiosk" the complainant appears to have been using it as a shop or at least as a store which falls within the Section 291(a) of the Penal Code Act.

[17] In the premises therefore, I find that the use of the word "Kiosk" does not adversely affect the conviction of the Appellant.

[18] Perhaps I should point out that the trial Magistrate must ensure that while taking a plea of guilt the prosecutor narrates the facts of the case in a more reasonable detail and not merely stating that as per charge sheet as was the case in this case. The narration by the prosecutor of the facts should be detailed enough so as to show clearly what took place at the scene of the crime and at the same time give a chance to the accused to challenge them if he thinks it is not what had happened.

[19] As to whether the Appellant appreciated the nature of the charge against him, the Lower Court Record shows that when he first appeared on the 8/09/11, the Constitutional Rights

to legal representation were put to him in accordance with Article 19 (2) (d) of the Constitution of Seychelles. A1 opted for a private brief andA2 opted for Legal Aid.

[20] On the 11/03/13, Mr. Raja appeared for the Appellant.

"Mr. Raja – Mr Serret has instructed me that he wants to plead guilty.

Court to Mr. Raja

Have you advised your client that there is a minimum mandatory sentence?

Mr Raja – Yes

Court to Accused No.1

Do you understand that if you are convicted there will be a minimum mandatory sentence of 10 years imprisonment?

Accused No. 1 – Yes.

Charge put to accused in Creole.

Accused – Guilty"

[21] Thereafter the facts were read out to the accused. It is my considered view that apart from the Appellant for opting a private brief and obtaining the services of Mr Raja as his counsel, the learned trial Magistrate read out the Constitutional Rights to the Appellant as well as explaining to both Mr. Raja and the Appellant the existence of minimum sentence facing the Appellant. The Appellant nevertheless went ahead and pleaded guilty to the offence. In such circumstances I cannot falter the learned Magistrate as he had conformed to the correct procedures. Hence, the first ground of appeal against conviction fails.

Mr Gabriel however, pointed out that Mr Raja and not the Appellant who is recorded as accepting the facts. This is an irregular practice and should be stopped. It should be the accused person, AND NOT his counsel to admit or dispute the facts. This is basically because, it is the accused person who knows what exactly took place at the scene and the

role he played while committing the offence. He is therefore the best placed person to admit or dispute the facts as narrated by the prosecutor. The counsel has only secondary knowledge of what took place, at the scene of the crime. **(See MARCEL DAMIEN QUATRE V/S THE REPUBLIC (2014) SCSC, CN 10/14** and the case of (**ADAN V/S THE REPUBLIC (1973) E.A 445 by East African Court of Appeal)**

[22] I will discuss the second ground of appeal regarding conviction which I discuss the grounds raised against sentence.

[23] I will start with the second ground against sentence regarding the trial Magistrate exceeding his sentencing powers given to him under Section 6.2 of the C. P.C.

[24] It is now settled that as a Magistrate the highest sentence he can impose before the passing of Act 4/14, is 8 years. The only alternative open to him if he thinks that the Appellant deserved a stiffer sentence than he is permitted by the law to impose was to refer the case to the Supreme Court under Section 7(1) of C.P.C**. (See YANNICK CONSTANT V/S THE REPUBLIC (2014 SCSC CN 41/2014)**

[25] In the premises therefore, the second ground under sentence succeeds and the sentence of 10 years imprisonment by the learned trial Magistrate is quashed.

[26] As to whether the sentence of 10 years imprisonment, apart from being in excess of the trial Magistrate' s jurisdiction was harsh, we have to look at the record of the Lower Court. What were the reasons advanced by the learned Magistrate before imposing the sentence of 10 years?

[27] " Prosecution :- Previous conviction.

[28] Mr Raja:- Agreed.

[29] Mitigation by Raja:-

[30] Accused has saved the courts time with advantage multiplicity of proceedings before Court. Accused remorseful; saved resources and time of a criminal trial. Pray the Court to consider not to impose any sentence exceeding more than the minimum mandatory.

[31] "<u>Sentence</u>

[32] I have considered the guilty plea of the accused and mitigation of Counsel and sentence the accused to the minimum 10 years imprisonment.

[33] I order that the sentence shall take appeal after the expiration of the sentence he is presently serving…appeal to Supreme Court with 14 days.

K. labonte (Mr)

Magistrate

11.03.13."

[34] The maximum sentence the Court can impose on an accused after conviction under Section 291 (a) Penal Code Act is 14 years imprisonment.

[35] According to the prosecutors list filed on the record, there are no significant sentences imposed on him apart from a fine, imposed in 2010 for stealing which is outside the ambit of section 27 of the Penal Code Act.

[36] Hence, the minimum sentence was rightly imposed out by the learned trial Magistrate as being 10 years, under Section 27 (1) (c) (i) of the Penal Code Act.

[37] The learned trial magistrate I think was influenced by the submission of the learned counsel for the Appellant while mitigating the sentence on behalf of his client as he appeared to pray for a minimum sentence permitted by law. Hence, he awarded the 10 years accordingly.

[38] It must be noted that it is not open to the appellate Judge to impose a sentence he would have imposed had he been in the shoes of the trial Court. He should interfere only in well known principles which in my view are not in issue in the instance case. In the premises therefore, the first ground regarding the harshness of the sentence fails.

[39] I will consider the second ground and conviction and the third ground under sentence together. The Appellate Court always looks at the Lower Court's record to determine what took place during the trial. In the instant case, there is no evidence apparent on the

Lower Court's Record to show that there was an amendment to the charge regarding the second accused person or that a lesser sentence had been imposed on him at the same time as the court was dealing with the Appellant.

[40] Perhaps I would point out that when there are more than one accused person being tried together or jointly, and one of them pleads guilty, it is prudent and a good practice for the trial Court not to impose a sentence there and then, but reserve such sentence till the full trial of the rest of the co- accused is completed. But as I have said there is no evidence before me show that the second accused was subsequently tried and an amended charge as alleged by the learned counsel for the Appellant. This ground also fails.

[41] In light of what I had said earlier during my consideration of the first ground of appeal on conviction, the ground 2 (c) on sentence also fails.

[42] All in all this appeal partially succeeds in the following terms.

(a) The sentence of 10 years imposed by the learned trial Magistrate was beyond his jurisdiction. It is accordingly quashed and a sentence of 8 years, is substituted.

(b) The rest of the grounds fail.

Order accordingly.

Signed, dated and delivered at Ile du Port on 24 July 2014

D Akiiki-Kiiza
Judge of the Supreme Court