IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN54 /2013

Appeal from Magistrates Court decision 193/2013

[2014] SCSC 296

LENNY TERRENCE HENRY
Appellant

Versus

THE REPUBLIC

Heard: 24 July 2014

Counsel: Mr. Gabriel for appellant

Mrs. Lansinglu, Attorney General for the Republic

Delivered: 1 August 2014

JUDGMENT

D.Akiiki-Kiiza J

[1] The accused was convicted by his Worship B. Adeline after he had pleaded guilty to a charge of Breaking into a building and committing a felony there in *Contra Section 291 (a) of the Penal Code Act* together with *section 23* of the same Act.

[2] He had been charged with the Co- Accused persons but it was him and A2, who pleaded guilty to the current charge. The learned Magistrate sentence both the appellant and A1 to a term of 15 years imprisonment.

[3] The appellant being dissatisfied with the orders of the learned trial Magistrate has now appealed to this court on both conviction and sentence.

[4] It is the law that once there is a plea of guilty, then prima facie the convict has no right to appeal against such a conviction save an appeal against the extent or the legality of the sentence *(section 309 (1) of Criminal Procedure Code*). However the courts have held that a conviction under a plea of guilty can successfully be challenged if the appellant can show that the plea was equivocal.

[5] In Seychelles the courts have held that while taking a plea, the judicial officer who is presiding must **EXPLAIN IN DETAIL** the nature of the offence in accordance with *Article 19 (2) of the Constitution of Seychelles*. See the case of **RAYMOND TARNECKI VS REPUBLIC S.C.A CRIMINAL APPEAL 4 /36).** Hence misapprehension of the law and the facts by the accused can render the plea of guilty equivocal and the appellate court will quash such a conviction. This appeared to be the view of their Lordships of the Court of Appeal in the case of **PAUL OREDDY VS REPUBLIC S.C.A 9/07** where their Lordships stated as follows:-

> **"***It is trite law that one cannot appeal against a plea of guilty entered. However, it should be distinguished between a plea of guilty freely and unequivocally entered and one that is obtained through inducement or Coercion"*

Therefore it is a general principle that a plea of guilt is equivocal where circumstances lead to a conclusion that the accused did not have a genuine and free choice between pleading guilty or not guilty, and a plea that is not voluntary is a nullity. For example in **TURNER [1970] 2QB 321,** the absence of free choice was occasioned by the impression which the accused had that it was the judge's view that he should plead guilty in order to attract a lesser punishment. Another example is in the case of **BARNES [1970] 55 CRIMINAL APPEAL LAW REPORTS 119** where the pressure was by the judge on the accused that he changes his plea from not guilty to guilty. Both of these two cases were found to be a total nullity on appeal. It also appears that where a third party and not he accused person accepts the facts during taking a plea of guilty, could also be held to be equivocal.

[6] The Seychelles Court of Appeal in the **RAYMOND TARNECKI** case already cited above, had the following to say:-

" If an admission of any fact constituting an offence is to be binding for the purpose of the conviction it is to be made by the accused and not by a third party which in (in this case) was the appellants counsel at the Supreme Court"

The above observations by the Court of Appeal is in line with my observations I made in the case of **MARCEL DAMIEN QUATRE VS THE REPUBLIC [2014] SCSC CN 10/14**.

[7] Apart from the misapprehension of the facts and the law discussed above there is another dimension in Seychelles whereby there is a requirement for the trial court to explain the availability and a provision of legal representation in the form of legal Aid. The courts have held that failure to do so, will render the plea of guilty equivocal. See the cases of **DAVID JEAN BAPTIST VS RPEUBLIC SCSC CRIMINAL APPEAL 37/98** and **ASHLEY FARABEAU VS REPUBLIC SCSC CRIMINAL APPEAL 4/09**. In the circumstances therefore failure of the trial court to explain to the accused person the availability of Legal Aid, and which explanation must be apparent on the record, would render a guilty plea wanting and equivocal resulting in a retrial being ordered by the appellate court. In the instant case the record shows the following:-

"Court: Accused No 1 and 2 that is your first appearance, I will explain to you, your constitutional rights to legal representation.

1. ***Self finance lawyer of your choice***
2. ***Legal Aid***
3. ***Defence case without lawyer***

Accused No 1: I do not want a lawyer, I will defend myself.

Court: May I warn you that this offence carries a maximum prison sentence of 14 years and a minimum sentence of 15 years. Do you still wish to defend yourself?

Accused No 1: Yes.

Court: What about accused No 2?

Accused 2: I do not need a lawyer I will defend myself.

Court: Even if I have warned you of the minimum mandatory and the maximum prison sentence for the offence?

Reply: Yes I will stand on my own; I do not need a lawyer.

Thereafter the learned trial Magistrate proceeded to take and record a guilty plea.

[8] It was Mr. Gabriel submission that the appellant who was A2 in the lower court was never adequately explained his right to Legal Aid as the Magistrate did in respect of A1.

[9] On the other hand Mrs. Lansinglu, for the Republic/ Respondent submitted to the effect that the learned trial Magistrate explained the legal representation to A1 in presence of A2, hence, he must have also heard what the trial Magistrate had said to A1. In her view the ground of appeal on conviction must and should fail.

[10] After a careful perusal of the Lower Courts Record, it is clear that the learned trial Magistrate addressed A1, first and then A2. All constitutional entitlements are recorded in respect of A1. However in regards A2 who is the appellant, the record shows the following:-

> ***"Court: What about Accused No 2?***
> ***Accused 2: I do not need a lawyer I will defend myself.***
> ***Court: Even if I have warned you of the minimum mandatory prison sentence for the offence?***
> ***Reply: Yes I will stand by my own. I do not need a lawyer."***

It is clear from the above proceedings in respect of the appellant that though the learned trial Magistrate explained the seriousness of the offence and existence of both a minimum mandatory and maximum prison sentence for the offence as he had done in respect of A1, he did not also inform the appellant of his constitutional right regarding Legal Aid entitlement as he had done in respect of A1.

[11] The contention of Mrs. Lansinglu that the learned trial Magistrate had addressed and had explained both the accused persons at once does not clearly come out from the lower court's record. In any case, the trial Magistrate deemed it fit and necessary to repeat the warning of the existence of the minimum mandatory and the maximum sentence for the offence with which both accused where charged with, as he had done to A1. This means that he had taken the pleas separately as he should have done anyway. Hence he should have also informed the existence of the Legal Aid to the appellant as he had done in respect of A1.

[12] In the premises therefore, I have to follow the precedents in the cases cited herein above and hold that the failure of the learned trial Magistrate to explicitly state on the record that he had advised the appellant of the existence of Legal Aid had occasioned a miscarriage of justice and I have no alternative but to quash the conviction and set aside the sentence of 15 years imprisonment against the appellant.

[13] The trial Magistrate must and should always record exactly what he had told the accused person during plea taking and what the accused person's response; was in verbatim. This would go a long way to assist the Appellate court get a clear picture of what actually took place at the plea taking, which in turn could reduce the filing of unnecessary appeals to this court.

[14] All in all, this appeal succeeds on the first ground regarding conviction. It will therefore be academic to consider the grounds on sentence. The case to be remitted to the Magistrate court for a re trial before another Magistrate under Section 316 of the Criminal Procedure Code. Order accordingly.

ORDER

A Copy of this judgment should be passed on to all Magistrates for their information and guidance.

Signed, dated and delivered at Ile du Port on 1ST August 2014

D.Akiiki-Kiiza
Judge of the Supreme Court