IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 53/2013

Appeal from Magistrates Court decision 106/2010

[2014] SCSC

DAVIS LESPERANCE
Appellant

versus

THE REPUBLIC

Heard: 23 May 2013, 10 July 2014

Counsel: Nichol Gabriel Attorney at Law for Appellant

Mrs. Lansinglu, Assistant Principal State Counsel for the Republic

Delivered: 26 September 2014

JUDGMENT

Burhan J

[1] This is an appeal against conviction and sentence.

[2] The Appellant was charged in the Magistrates' Court as follows;

Count 1

Criminal Trespass contrary to and Punishable under Section 294 (2) of the Penal Code.

The particulars of offence are that Davis Lesperance, residing at Beau Vallon, Mahe, on the 12th day of February 2010, at Beau Vallon, Mahe, entered into the property of

another, that is to say the store of Guilliette Green being the person who is lawfully in possession of the property with intent to commit a felony therein.

Count 2

Entering in a dwelling house contrary to and Punishable under Section 290 of the Penal Code.

The particulars of offence are that Davis Lesperance, on the 12th day of February 2010, at Beau Vallon, Mahe, entered into the dwelling house of Guilliette Green with intent to commit a felony therein, namely stealing.

Count 3

Stealing from dwelling house contrary to Section 260 and Punishable under Section 264 (b) of the Penal Code.

The particulars of offence are that Davis Lesperance, on the 12th day of February, 2010, at Beau Vallon, Mahe, stole from dwelling house of Guilliette Green the following: one (1) bottle of alcohol liquor label Black Growslatie, one (1) bottle of alcohol liquor label Movette Chandron, one (1) bottle of Irish Cream, one (1) bottle of Whisky Red Label, and 2,000/- Singaporean dollars, being the property of the said Guilliette Green.

[3] The Appellant denied the charges and after trial the learned Magistrate Mr. K. Labonte acquitted the Appellant on Count 1 and found him guilty on Counts 2 and 3 and proceeded to convict the Appellant on both counts. The Appellant was sentenced to a term of 3 years imprisonment on Count 2 and to a term of 1 ½ years imprisonment on Count 3. The learned Magistrate further ordered that both terms run consecutively,

[4] Learned counsel for the Appellant bases his appeal on conviction on the following grounds-

"The learned Magistrate erred in convicting the Appellant on a repudiated statement which was not corroborated.

The learned Magistrate erred in convicting the Appellant on conflicting finger print evidence."

[5] On perusal of the proceedings however it is apparent that the Appellant had retracted his statement on the basis that he was forced to give a statement and not repudiated it i.e. denying he ever gave a statement or denying he had not stated certain parts of it. The learned Magistrate had quite correctly thereafter held a voire dire and come to a finding that the said statement had been given voluntarily and was admissible. The learned Magistrate in his reasoning had this to say,

"He (the accused) never denied that he has given a statement to the officers though both the recording officer and the witness never signed the statement..... accused has never denied that it is not his signature that was on the statement."

[6] Further the Appellant in his unsworn statement at the voire dire states-

"They arrested me at 4.30 in the afternoon and took the statement from me the next day. The statement that we made was a statement that I was forced to make."

[7] The two officers who recorded and witnessed the statement have given oral evidence under oath that they did record and witness the said statement. Further the Appellant admits that a statement was given by him to the two officers. Therefore despite the two officers failing to sign the said statement, the learned Magistrate cannot be faulted for accepting the evidence of the two officers that they recorded the statement as the accused himself admits he gave a statement to them.

[8] For the aforementioned reasons I do not agree with learned counsel for the Appellant that the learned Magistrate erred in convicting the Appellant on a repudiated statement which was not corroborated as the statement under caution according to the facts before court has been retracted and not repudiated. It appears after dealing with the voire dire correctly on the grounds that the said statement had been retracted as the voluntariness was challenged the learned Magistrate has used the word repudiated in certain instances in his judgment. However he has followed the proper procedure at the voire dire in

coming to a conclusion that the challenge was in respect of the voluntariness of the statement and therefore no prejudice has been caused to the Appellant.

[9] To further understand this issue I will refer to the case of ***The Republic v. Valentin & ors [1989] SLR 40.***

In this case the accused was charged before the Magistrates' Court with burglary and when his statement was produced, the accused denied that he had made any statement and alleged that during the time he had been in the cell, one detective inspector had got his thumb impression on a piece of paper. The Magistrate after holding a trial within a trial, held that the statement was inadmissible. It was held: (1) All the Magistrate had to decide as a matter of fact was whether or not the statement was made by the accused. (2) In the instant case voluntariness was not in issue at all. (3) The Magistrate misdirected himself on the question he posed in the trial within trial.

It is apparent therefore in a repudiated statement there is no necessity to hold a voire dire but the magistrate has to decide the issue as a question of fact.

[10] In the case of ***Rachelle v. The Republic [1984] SLR 42*** it was held;

"In any case of a confession which had been retracted, there is need to look for corroboration before it can form the basis of a conviction, while in the case of a repudiated confession, it will depend entirely on the circumstances whether corroboration should be regarded as essential."

[11] In his retracted statement the Appellant states he had cashed a certain amount of Singapore dollars at Bureau D Exchange. This incriminating piece of evidence is corroborated by the evidence of witness Gretel Banane the office manager of Bureau De Change. The receipt signed by the Appellant was produced as an exhibit. This court is therefore satisfied that sufficient corroboration exists on this material fact for the learned Magistrate to have accepted same. The Appellant admits in his retracted statement he

entered through the sliding door, this admission is corroborated by the evidence of the finger print officers.

[12] Therefore it is apparent the material facts incriminating the Appellant as set out in the retracted statement of the Appellant have been corroborated by independent evidence as set out above.

[13] I have considered the finger print evidence led by the prosecution and find that there were no material contradictions in respect of same. Mr. Jude Bistoquet explains how he lifted the finger print from the sliding window. He honestly stated he could not recall as to whether it was taken from the inside or outside of the sliding window. Superintendent Reginald Elizabeth explained to court how he compared the prints with that of the Appellant and marked out 10 points of similarities of ridge characteristics. This evidence only establishes the fact that the accused finger prints were on the window. I see no reason to disturb the learned Magistrate's findings on these issues. Identification by finger prints by a person expert in such prints is allowed and maybe sufficient even though the only evidence of identification ***R v Court (1960) 44 Cr. App.R. 242.***

[14] Therefore learned counsel for the Appellant's contention that the learned Magistrate erred in convicting the Appellant on conflicting finger print evidence bears no merit.

[15] In regard to the challenge in respect of sentencing the learned Magistrate has sentenced the Appellant to a term of 3 years on Count 2 and to a term of one and a half years on Count 3. A person convicted on Count 2 under section 290 of the Penal Code is liable to a term of 7 years imprisonment while a person convicted on Count 3 under section 260 read with 264 (b) of the Penal Code is liable to a term of 10 years imprisonment.

[16] Considering the maximum sentence that could have been imposed on both Counts, I am of the view that the sentences imposed by the learned Magistrate cannot be said to be harsh and excessive considering the seriousness of the offences and the value of the items stolen as set out in the particulars of the offence.

[17] Learned Counsel for the Appellant moved court that both terms be ordered to run concurrently. It is apparent the offence had been committed prior to the amendment of section 36 of the Penal Code concerning the mandatory imposition of consecutive

sentences for certain offences which came into force on the 17th of August 2010. Therefore it is the view of this court that the said amendment would not apply as the offence in this case was committed on the 12th of February 2010.

[18] However considering the seriousness of the offences for which the Appellant has been found guilty and convicted, I am of the view that the total term of 4 ½ years imprisonment imposed by the learned Magistrate is a just and appropriate term of imprisonment considering the facts peculiar to this case. It is apparent that the learned Magistrate had given a lower sentence on each count as he intended to make the sentences consecutive. For these reasons this court will not seek to interfere with the said sentence.

[19] I therefore proceed to affirm the conviction and sentence of the learned Magistrate. The appeal against conviction and sentence is dismissed.

Signed, dated and delivered at Ile du Port on 26 September 2014

M Burhan
Judge of the Supreme Court