

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 37/2012

Appeal from Magistrates Court decision 617/2012

[2014] SCSC 424

NIGEL ADONIS

Appellant

Versus

THE REPUBLIC

Heard: 22 September 2014

Counsel: Mrs. Karen Domingue for appellant

Mrs. Lansinglu Romei, Attorney General for the Republic

Delivered: 7 November 2014

JUDGMENT

Akiiki-Kiiza J

[1] The appellant was charged before the trial court with 2 counts. The first count being that of house breaking, *Contra Section 289 (a) of the Penal Code act.*

[2] Particulars where of whereof that he, residing at La Misere, Mahe, on the 1st day of September 2012 at La Misere, Mahe, broke and entered the Dwelling House of Marie Michel with intent to commit a felony therein, namely stealing. In the second count the appellant was charged with stealing from a Dwelling House *Contra Section 260* and punishable under section 264 (b) of the Penal Code act.

[3] It was said that he, on the same day, time and place stole from the dwelling house of Marie Michel, one circular saw make “Makita” valued at Rs3, 200/-, one planner make “Makita” valued at Rs1500/-, one router make “Draper” valued Rs2,500/- and one box containing router bits valued at Rs1,800/- all being the property of Jason Adonis.

[4] When he appeared before the trial Magistrate he pleaded guilty and was convicted up on his on plea on the 2nd count but he pleaded not guilty on the 1st count. Where upon the prosecution purported to withdraw the 1st count; this of course was erroneous as it offends the provision of *Section 145 of the Criminal Procedure Code* which permits a withdraw of such charges **AFTER** conviction but not before as in this case. A conviction comes only after the prosecution had narrated the facts which the accused then accepts as true and correct, which was not the case here. (See the case of **DAVID AND JEAN BAPTISTE VS REPUBLIC [2014] SCSC CN 23/14**. Be it as it may the appellant has now not appealed against conviction but sentence, whereby he raised the following grounds in his Memorandum of Appeal:

- a) *That the learned Magistrate erred in not taking in account that the properties stolen by the appellant had been recovered by the police.*
- b) *That the learned Magistrate did not take into account the fact that the appellant was unrepresented, (and) had plead guilty and was a first offender*
- c) *That the learned trial Magistrate took into account matters which he should not have taken into account and the sentence was unwanted in all the circumstances of the case.*

In short the appellant is saying that the sentence imposed upon him by the learned trial Magistrate was manifestly harsh and excessive in the circumstances of this case.

[5] During the oral submissions Ms. Karen Domingue represented the appellant and Mrs. Lansinglu appeared for the Republic/Respondent. Ms. Domingue at the hearing abandoned the 3rd ground of appeal and concentrated on the first two grounds.

[6] As regards the 1st ground of appeal, Ms Domingue submitted to the effect that the learned trial Magistrate never took into consideration the mitigating factors, such as plea of guilty, the property being recovered, and having no previous record.

[7] On the other hand Mrs. Lansinglu for the Republic supported the sentence of 5 years imprisonment imposed by the Magistrate noting that the Magistrate must have had the mitigating factors in mind while he imposed 5 years instead of 8 years as the per maximum sentence.

[8] The lower court record shows the following when the appellant was convicted and sentenced.

Accused **“I want to plead guilty to take those items. I am ready to give back those items”**

Court **“You sure you are ready to take the plea”**

Accused **“Yes”**

Court **“Read Charges”**

Accused **“Not Guilty”**

Court **“A not guilty plea entered on record in respect on count number 1”**

Accused **“I am guilty”**

Court **“A plea of guilt is entered on record in respect on count number 2”**

Republic **“Your Worship, withdraw count number 1”**

Court **“Count Number 1 is withdrawn, would the prosecution narrate the facts in respect of count number 2”**

Republic **“On the 1st September 2012, the accused stole the items in the particulars of the charge sheet from his grand mother’s house; the tools belong to his father Wilson Adonis. There is an order from the family tribunal for him not to go to that house. All the stolen items have been recovered save the router. He had sold these times and the police have taken those items from the person he sold”**

Court **“Do you admit the facts”**

Accused **“Yes”**

Court **“The accused is convicted on his own plea”**

Republic **“He has no previous record”**

Court **“Anything you wish to say in plea mitigation”**

Convict **“No”**

Court **“Sentence of the court. The offence committed by the convict is very serious. One that is prevalent in our society today and one which there are calls from members of the public for tougher sentences to deter the offenders from re offending and others who may be tempted to commit similar offences. Nobody knows when he or she would be next victim. Courts are entrusted with judicial powers to do justice in each and every case, and to make sure that the members of the public are protected from similar criminals. In the circumstances this court hereby imposes a prison sentence of 5 years in on the convict from today”**

Signed: B. Adeline

Magistrate.

- [8] It is obvious from the above record that the trial Magistrate never expressly took into consideration the mitigating facts. For example he did not state, that the appellant had pleaded guilty; which usually would result in reducing the final sentence. This is because plea of guilty give rise to significant benefits, including the saving of the courts time and public money and the sparing of witnesses from having to attend the trial to give evidence. A plea of guilty may also be indicative of some remorse. (**See ARCH BOLD, 2014 ED. PARA 5-112**). Where a judge takes a plea of guilty into account, it is important that he says that he has done so (**see R VS FEARON [1996] 2 CRIMINAL APPEAL. R (S) 25**). Though it might not be necessarily mean that he did not take such into consideration if it is obvious from the sentence that he may have done so. It is however desirable that sentences should indicate that credit had been given (**see R VS ARAORIDE [1999] 2 CRIMINAL APPEAL (S) 406. CA**).
- [9] The next point, to consider is what is the extent of the discount after an accused has pleaded guilty. There appears to be no absolute rule as to what extent the discount would be. (**See LORD TAYLOR, C.J, IN THE CASE OF R VS BUFFERY, 14 CR. APP. R(S) 511, CA**). The learned Chief Justice stated that, as a general guidance, the court believed that, something of the order of one third would be appropriate discount. In the case of **ATTORNEY GENERAL REFERENCEE NOS 14 AND 15/2006 (R VS FRENCH AND WEBSTER [2007] 1 CR.APPL R (S) 40, CA**). It was held that there was no basis for withdrawing the full discount where heavy sentence imposed for a serious offence on a basis that, the discount would be disproportional. That is to say that, the discount would be big.
- [10] Ms Domingue also pointed out that the learned trial Magistrate never mentioned that the appellant was a first offender despite the fact that the prosecution had pointed it out to the court.
- [11] Thirdly, that the trial Magistrate never took into consideration that the stolen property had been recovered, apart from the router valued to Rs1,800/-. All these should be and must expressly reflect in the reasons the court gives before passing a sentence to the appellant.

- [12] The record clearly shows that the Magistrate went straight to consider the seriousness of the offence and its prevalence and the need to impose tougher sentences. Of course he was entitled to do so. However some of the reasons he gave for imposing the sentence were from himself, as the prosecution never pointed them out to the court. The trial court must balance both the need to be tough, but also to consider things in favour of an accused. He must say so in his ruling.
- [13] All in all the 1st ground of appeal succeeds. As to the 2nd ground of appeal, the record shows that the Magistrate had informed the accused the choices he had in accordance with *Article 19 (2) (d)* of the *Seychelles Constitution* and the accused straight away stated that he wanted to plead guilty. In the circumstances, I cannot fault the trial Magistrate. This ground fails due to lack of merit.
- [14] All in all had the trial Magistrate considered the mitigating factors as outlined here above, and had balanced it with the reason he gave for imposing a tougher sentence of 5 years , he would have substantially reduced the sentence from 5 years to downwards. Putting everything into consideration, I reduced the sentence of 5 years imposed on the appellant and substitute it with a sentence of 3 years imprisonment.
Order accordingly.

Signed, dated and delivered at Ile du Port on 7 November 2014

Akiiki-Kiiza JJudge of the Supreme Court