

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 79/2013

Appeal from Magistrates Court decision 383/2011

[2014] SCSC 428

RYAN GERRY

Appellant

versus

THE REPUBLIC

Heard: 29th October 2014; 5th November 2014.

Counsel: Mr. Basil Hoareau Attorney at Law for appellant

Mr. Ananth Subramanian, Assistant Principal State Counsel for the Republic

Delivered: 12 November 2014

JUDGMENT

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

[2] The Appellant in this case Ryan Gerry was charged with another in the Magistrates' Court as follows:-

Count 1

Breaking and entering into building and committing a felony therein contrary to Section 291(a) read with section 23 of the Penal Code.

The particulars of offence are that, Ryan Gerry and Valentina Dodin, both residing at Takamaka Mahe, during the early hours of the 09th of December 2011 at the Banyan

Tree Hotel, Takamaka, Mahe, broke and entered beach villa number 124 and stole therein one LCD Television make Sony to the value of \$1400, one DVD player make Phillips to the value of \$250, one MP3 player & two speakers to the value of \$350, one water kettle to the value of \$39, various bottles of wines, liquors, spirits and foodstuffs to the total value of \$174, all amounting to the total value of \$2213 being the properties of the Banyan Tree Hotel.

- [3] The learned Magistrate after trial found the Appellant guilty of the charge and sentenced him to a term of 7 years imprisonment.
- [4] The background facts of this case are that the Appellant and his girlfriend Valentine Dodin had attended a barbeque party at villa no 125 of Banyan Tree Hotel hosted by a friend Rian Asba who was an employee of the said hotel. During the party, the Appellant had gone with his girlfriend to a neighbouring villa no 124 with the intention of using the Jacuzzi. In order to enter the villa, the Appellant had pulled open the door with force and entered. The Appellant admits in his statement under caution he had consumed a lot of liquor and as he and his girlfriend were relaxing on the bed in the villa, a “bad intention” had come into his mind and he had decided to steal the items as mentioned in the particulars of offence which were in the room. It is apparent therefore the intention to steal had materialized some time after he had entered the room with his girlfriend.
- [5] His girlfriend had assisted him and they had taken the items and hidden them in the bushes near the beach and both had left to bring his vehicle to take the items away. Meanwhile the security officer on duty Harry Confiance had come across the hidden items and when he arrived with his girlfriend to collect the items they had been detained by the security and handed over to the police and thereafter charged in the Magistrates’ Court. The learned Magistrate had found the Appellant guilty on the count as charged but the girlfriend of the Appellant was found guilty for the offence of Stealing.
- [6] It is apparent that the prosecution by filing a charge under section 291 (a) and not 289 (a) of the Penal Code has admittedly accepted the fact that at the time of breaking and entering into the villa the Appellant did not have the intention to commit a felony. It is to be further noted the prosecution did not frame a separate charge for Stealing against the Appellant.
- [7] Learned counsel for the Appellant challenged the charge against the Appellant under section 291 (a) of the Penal Code on the grounds that a beach villa did not fall into any of

the categories of buildings set out in this particular section. Learned counsel for the Respondent conceded that a beach villa did not fall into any of the said categories but relied on section 344 (a) of the Criminal Procedure Code to maintain the findings of the learned Magistrate.

[8] Section 344 (a) of the Criminal Procedure Code reads as follows-

Subject to the provision hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account

(a) Of any error, omission or irregularity in the summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code; or

(b) ...

(c)

Unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice.

[9] I am inclined to disagree with learned counsel for the Respondent in that it was the duty of the prosecution to prove the essential elements of the charge beyond reasonable doubt. It is apparent on the analysis of the evidence, the incident is said to have occurred in a beach villa which is not a building described in the section. Therefore the evidence led at the trial does not support the elements required to be proved in this particular charge. In such a situation in my view, it would be unfair, prejudicial and a failure of justice to convict him of the said charge which is serious in nature as it attracts a term of 14 years imprisonment and a minimum mandatory term of 10 years.

[10] The evidence nevertheless in my view, clearly establishes beyond reasonable doubt all the elements of the lesser charge of Criminal trespass as set out in section 294 (1) of the Penal Code. It is clear that the learned Magistrate relied heavily on the retracted statement of the Appellant. Though retracted sufficient corroborative evidence exists from the evidence of the security personnel namely Harry Confiance and Thakur Prasad and therefore the learned Magistrate cannot be faulted for accepting same.

[11] This court therefore proceeds to set aside the conviction under section 291 (a) of the Penal Code and find the Appellant guilty on the lesser charge of Criminal trespass under section 294 (1) of the Penal Code. Section 294 of the Penal Code further sets out that if

the offence has been committed in a building used as a human dwelling place, the offender is liable to imprisonment for five years.

[12] I have considered the facts in mitigation and the other connected documents of good character tendered by the employers of the Appellant who have stated they are willing to take him back despite this lapse on his part. The evidence of good character has not been rebutted. Further it is borne out from the statement of the Appellant which was accepted by the trial court and the other evidence led at the trial that the Appellant had initially come to the hotel to attend a party which he had been invited and therefore had not come to the hotel with the intention of breaking into any part of it or stealing.

[13] It is apparent from the evidence before court that the Appellant is not a habitual offender who breaks into hotel rooms and steals items. For the aforementioned reasons and as the Appellant has been found guilty of the lesser offence of Criminal trespass in Appeal, the sentence of imprisonment of 7 years imposed by the learned Magistrate is set aside and a term of three years imprisonment substituted. Time served and time spent in remand to count towards sentence.

Signed, dated and delivered at Ile du Port on 12 November 2014

M Burhan
Judge of the Supreme Court