

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 9/2013

Appeal from Magistrates Court decision 176/2012

[2013] SCSC

DERECK SAMSON

Appellant
Versus

THE REPUBLIC

Heard: 24 January 2014
Counsel: Mr. Durup for appellant
Mr. Robert, Assistant State Counsel for the Republic
Delivered: 13 February 2014

JUDGMENT

McKee J

The Appellant was charged with the offence of Breaking and Entering into a Building and Committing a felony therein contrary to section 291[a] of the Penal Code.

The Particulars of the offence read as follows:

- [1] Dereck Samson, residing at North East Pointe, Mahe, during the night of 30th day Of January in the year 2012, at North East Pointe, Mahe, broke and entered the Seaview Shopping Centre, and stole therein four [4] packets of Basmati rice [25kg], some packets of cigarettes Mahe King, 10 Airtel cards [R50], 20 Airtel cards [R25], some bottles spirits and liquor, all amounting to the total value of SR 25,000, being the properties of Vetrivel Lesser.
- [2] The Appellant was represented at trial by Mr. Gabriel. The Appellant pleaded Not Guilty to the charge. At the end of the prosecution case the Magistrate rejected a submission of no case to answer. Following the election, the Appellant elected to give an unsworn statement from the dock. The Magistrate found the Appellant guilty and CONVICTED him of the charge. By way of mitigation the Magistrate was advised that the Appellant was a first offender. The Appellant was sentenced to ten years imprisonment. The Appellant now appeals against CONVICTION and SENTENCE.

I have considered the Notes of Proceedings, the written Judgment, the Reasons for Sentence and the Submissions made on behalf of the Appellant and the Respondent.

[3] **FACTS OF THE CASE.**

The Prosecution called three witnesses. PW1 was Marcus Julienne and the brother of the Appellant. It was the evidence of PW1 that his residence is close to the shop in question. His testimony was that, having been alerted by his younger brother, he went into the dining room and looked out to see his brother, the Appellant, close to the shop in question with a cutter in his hand. The time was about 3.15 am and he could make this observation because there was a light immediately outside the shop. He saw the Appellant cut the padlocks which secured the access to the shop. He left his observation point to telephone the police. He did not see any person enter the shop. He concluded later that entry to the shop must have been carried out while he was telephoning the police. He stated that the Appellant later came to him and gave him a box of cigarettes. In cross-examination the record of the proceedings shows that he told the court there was no bad feeling between him and his brother, the Appellant. He repeated what he said in examination in chief

regarding the actions of his brother. He offered additional information that he had been put under arrest when he gave his formal statement to the police. There is no evidence to suggest that the police followed up on this initial action.

PW2, WPC Santache, took the initial report from PW1. She went to the shop and found the lock and padlock broken.

PW3 was Vetrivel Lesser, and the tenant in the shop. After the report of the break-in he went to the shop. He observed that the padlocks which he had put on the main door were removed. He also stated that there was a small electric light on the veranda of the shop. He gave evidence of items removed from the shop. PW3 remained unshaken in cross-examination.

Following a submission at the end of the prosecution case the Magistrate ruled that there was a case to answer.

The Appellant elected to give an unsworn statement from the dock. He stated that he took no part in this venture. He denied participation. He said he was not present. He stated that PW1 told him that he, PW1, would give him Rs1000 to report that he had broken in to the shop. He said he took the money but gave no statement to the police. No witnesses were called by the defence.

In his submission of no case to answer and closing submission Defence Counsel expressed the view that the absence of corroboration of the evidence of PW1 was fatal and hence there was insufficient evidence to support a conviction. In his judgment the Magistrate stated that he found PW1 to be a truthful witness and accepted his version of the facts. He also took into account all the other evidence before the court. He found there was sufficient evidence to convict, which he did.

[4] SUBMISSIONS.

In his submission Mr. Durup for the Appellant again reviewed all the facts before the court. The thrust of the submission was that it was unsafe in all the circumstances to base

the conviction solely on the testimony of one person, PW1. There was even a hint of suspicion that PW1 may have been involved in the break-in and that he was putting the blame on the Appellant.

Counsel for the Respondent supported the conviction. He pointed out that no witness was called in support of the Appellant's version of events. He also spoke to the strength of the circumstantial evidence pointing to the guilt of the Appellant.

[5] FINDINGS IN RESPECT OF APPEAL AGAINST CONVICTION.

The Magistrate found PW1 to be a witness of truth and accepted his version of events. The evidence of PW1 as to light at the scene of the break-in is corroborated by PW3, Lesser, the shopkeeper. PW3 also corroborated PW1'S evidence that the shop was secured by padlocks. PW2, WPC Santache spoke of the main door being broken. PW3 spoke of entering the shop and observing that items were missing.

PW1 saw his brother, the Appellant, at the shop at 3.15 am and cutting the padlocks. The Magistrate was fully entitled to infer that the Appellant, having cut the padlocks, proceeded into the shop and stole the items alleged. By making this finding the Magistrate had rejected the evidence of the Appellant.

The Magistrate accepted the evidence of PW1 as truthful. There was also the supporting evidence, as I have mentioned, from the other prosecution witnesses. At common law one witness is sufficient to sustain a conviction. The question of credibility is essentially one for the trial magistrate to make. The Magistrate has the opportunity to observe the demeanour of the witnesses and the manner in which each gave his evidence. I have no reason to disagree with his findings. I find that the Magistrate was justified in making the finding he did.

Accordingly the appeal against conviction is DISMISSED.

[6] FINDINGS IN RESPECT OF APPEAL AGAINST SENTENCE.

The offence occurred on 30th January 2012. The date of conviction was 20th December 2012. The Magistrate convicted the Appellant under section 291[a] of the Penal Code and, although not expressly saying so, must have held that he was bound by the minimum mandatory sentencing provisions. An offence under section 291 of the Penal Code carries a liability to imprisonment of 14 years. By applying the minimum mandatory sentencing provisions as at 30th January 2012 the Magistrate sentenced the Appellant to 10 years imprisonment. By doing so I infer that he took the Appellant as a first offender and found no mitigating circumstances in his favour.

I understand the Magistrate's thinking on sentence in this matter but in doing so he exceeded his sentencing powers as prescribed in section [6][2] of the Criminal Procedure Code. I take judicial notice that the magistrate presiding in this case is a magistrate other than a Senior Magistrate.

Section 6[2] reads as follows:

(2) The Magistrates' Court when presided over by a Magistrate other than a Senior Magistrate may pass any sentence authorised by law:

Provided that such sentence shall not exceed, in the case of imprisonment, 8 years, and in the case of a fine, Rs75,000.

I find that the Magistrate in imposing the sentence he did exceeded his statutory powers. I set aside the present sentence of 10 years imprisonment. I look again at the circumstances of this case.

The Appellant had broken into commercial premises, not residential property. He broke padlocks to gain entry. A substantial amount of items were removed from the shop. Their value is given at Rs25000. There was no evidence that any items have been recovered.

I keep in view the maximum sentencing powers open to the magistrate and the circumstances of the case. In my opinion an appropriate sentence is one of 6 years

imprisonment. Consequently, I quash the sentence of 10 years imprisonment and in substitution impose a sentence of 6 years imprisonment.

On the day prior to the delivery of the above judgment I received proceedings relating to a further appeal lodged by this Appellant. Only the Notice of Appeal had been lodged.

Without going into the merits of the second appeal I noted the following. The Appellant was charged and convicted for the offence of possession of a controlled drug contrary to the Misuse of Drugs Act and sentenced to 12 months imprisonment. The date of conviction and sentence was 20th November 2012 which was only one month prior to the date of conviction in the case presently before me on appeal. The Appellant had been convicted of being in possession of a small quantity of drugs, namely, 7 milligrams of heroin. This offence relates to drugs. The present appeal relates to an offence of dishonesty.

In the present appeal the magistrate ordered that the sentence he imposed of 10 years imprisonment, now reduced to 6 years imprisonment, should “start to run after the expiration of all sentences passed on the accused prior to that day”, that is consecutive to any previous sentence imposed.

We now are aware that there was only a short period of one month between the dates of conviction and sentence in the two cases. As matters stand at present, the Appellant is required to serve an aggregate sentence of 7 years imprisonment. I consider the position under the totality principle and whether this total sentence is just and appropriate taking the offences as a whole into account.

Looking at all the circumstances and especially the small quantity of drugs involved I am of the view that the aggregate sentence is too high and I order that the substituted sentence of 6 years imprisonment for breaking and entering to commit a felony shall run CONCURRENTLY and not consecutively with the earlier sentence of 12 months imprisonment in respect of the drugs offence.

Signed, dated and delivered at Ile du Port on 13 February 2014

C McKee

Judge of the Supreme Court