IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 87/2013

Appeal from Magistrates Court decision /20

[2015] SCSC 191

ALEX MOSES

Appellant

versus

THE REPUBLIC

Heard: 21 April 2015

Counsel: Mrs Amesbury for appellant

Mr Kumar, Attorney General for the Republic

Delivered: 24 April 2015

JUDGMENT

Akiiki-Kiiza J

[1] The appellant was tried and convicted by his worship D. Adeline on a charge of housebreaking contrary to section 289 (a) of Penal Code whereby he was sentenced to 12 years imprisonment as the first count and on the second count was sentenced to 4 years imprisonment on a charge of stealing from a dwelling house contrary to section 260, read together with section 264 (b) same act. The learned trial Magistrate ordered the 2 sentences to run consecutively.

[2] The appellant was not satisfied with the above orders and he has now appealed on both conviction and sentence to this Court. His memorandum of appeal raises the following grounds:-

a) That the appellant was unrepresented at his trial/plea taking and that the Court failed to inform him of the consequences of a guilty plea, especially in view of the fact that he was not a first offender.

b) That the learned trial Magistrate erred in not informing the appellant that as a person with a previous criminal record the sentences imposed would be mandatory.

Against sentence

c) That since both offences were committed in the course of the same transaction and on the same date and in same premises against the same victim. Hence the sentence should have been made to run concurrently.

At the hearing Mrs Amesbury appeared for the appellant, and Mrs Kumar represented the Republic/ respondent. Mrs Amesbury made the following oral arguments

(i) That the person who was named in the facts accepted by the accused (appellant) was one Christopher but not Alex Moses the appellant.

(ii) That the appellant had not been informed of his constitutional rights regarding the right of counsel under Article 19 of the constitution.

(iii) That the learned trial Magistrate did not explain the consequences of pleading guilty to an offence with mandatory and minimum sentence.

She cited a recent case by the Court of Appeal of **RODDY LENCLUME VS REPUBLIC SCA Cr App 32/2013** in support of her submission.

(iv) That even the trial Magistrate had exceeded his sentencing powers when he ordered the sentence on both counts to run consecutively. (12 + 4 = 16 years) The maximum he can impose was 8 years imprisonment.

[3] Mr Kumar on his part stated that the facts as narrated by the prosecutor had referred to the accused person among others who subsequently accepted the facts as correct before he was convicted. This shows that the accused knew that the facts were referring to him and nobody else.

[4] As for his right to be represented if he so wished as per article 19 of the Constitution, Mr Kumar stated that, the learned trial Magistrate had adequately explained to the appellant his choices under law and that the accused chose legal aid and that he subsequently had applied for it. By the time of plea, it is the appellant's duty to ensure that he had been allocated a lawyer. As for the consecutive sentence of 16 years imprisonment Mr Kumar never supported it as it was contrary to section 6 (2) of the Criminal Procedure Code.

[5] I have carefully considered all the submission of both learned counsel. I have also carefully reviewed the law applicable both statutory and case law. I make the following findings:-

I will start with the consecutive sentence of 16 years imposed on the appellant. This is not supported by either counsel. Section 6 (2) clearly limited the jurisdiction of the learned trial Magistrate to 8 years only. This is so irrespective of the fact that the impugned sentence was imposed under section 9 (2) of the Criminal Procedure Code or not.

[6] The Court of Appeal in the recent case cited by Mrs Amesbury of **RODDY LENCLUME** held that the trial magistrate cannot exceed this jurisdiction. This has been the legal position held by this Court for sometime now. Hence given the above legal position, the sentence of 16 years imposed by the learned trial magistrate on the appellant is not attainable and cannot be allowed to stand. It is accordingly quashed. I will return to this point later on regarding the way forward.

[7] Now I turn to the other points raised by Mrs Amesbury. It is better however to reproduce the part of the record when the appellant took the plea and when the accused first appeared in the Lower court. As well as whether the appellant was informed of his constitutional rights under article 19 (2) (d) of the Constitution.

The Lower Court record shows the following:-

" 09/01.13

Republic – Mr Dogley

Accused – Present

Court: Right of legal representation explained to the accused in creole – right under article19 (2) (d) of the Constitution.

1. **Legal Aid.**
2. **Pay counsel of choice.**
3. **Defend self.**

Accused: Legal aid."

At this stage, the case was before Mrs Pillay. Thereafter, the case was taken over by Mr Adeline the current trial Magistrate. Mr Adeline took up the case that very afternoon and the record shows that, he had also explained the Constitutional rights of the accused as Mrs Pillay has done earlier on and the accused again chose legal aid. Thereafter the accused was released on bail. On the 8/02/13, the Court inquired from the accused whether he had secured legal aid. The accused (appellant) stated that:-

"Accused: I have the application now. I have just collected it."

Court: Accused served with documents. This Court will give you 4 weeks to sort out legal representation…Should you be absent, a not guilty plea will be entered on the record – that will be the trial date.

On 28/03/13 the Court record shows that accused was present and a trial date was fixed on 19/08/13. The Magistrate reminded the appellant again of his right to counsel. On 03/04/13, the following entry appears on the record:-

" 03/04/13

Republic: Represented by Ms Durup.

Court:- **Where is your lawyer?**

Accused: **I have none. I did not seek for one.**

Court: **Are you still maintaining you are not guilty plea to the two charges.**

Accused: **I have not taken plea. I was sick on the day plea.**

Court: **Are you ready to take the plea now?**

Accused: **Yes.**

Court: **I will put the charges to you and you will tell the Court whether you are guilty or not.**

Court: **Charges read.**

Accused: **I am guilty.**

Court: **Guilty plea entered on the record against the accused person in respect of count number 1.**

Accused: **I am guilty.**

Court: **Guilty plea entered on record against the accused person in respect of count number 2."**

Thereafter the prosecutor narrated the facts, which the accused admitted, and he was consequently convicted and sentenced 16 years on both counts.

[8] Given the above scenario of what took place in the Lower Court, the question for determination is whether the learned trial Magistrate conformed with the provisions of Article 19 (2) (d) of the Constitution? Mrs Amesbury says he did not; whereas Mr Kumar insists that he had adequately advised by his …for legal representation. It is my considered view, given the entries on the Lower Court record as cited above, that, both Mrs Pillay and Mr Adeline adequately explained to the accused about his legal rights under section 19 (2) (d) of the Constitution. Actually Mr Adeline took it upon himself to

enquire from the appellant many times whenever appellant had secured legal representation. The accused continued to say that he had not got any though he had applied for it. On the day of the plea taking the appellant said: " **I have none. I did not seek for one."** And when he was asked whether he was ready for the plea he said he was ready. Upon this I am satisfied that the learned trial Magistrate had conformed with the provision of Article 19 (2) (d) of the Constitution. The accused clearly stated that he did not seek for Legal Aid Certificate from the Registrar of the Supreme Court or her representative where he had got the application forms from. He had at this time been released on bail before the plea hence he had ample opportunity to move around to the Registrar's office so as to secure the Legal Aid certificate. He chose not to do so. This cannot, in my view, be blamed on the trial Magistrate. The appellant chose to sit on his rights and has to bear the consequences.

[9] Having said that however, a careful perusal of the record as reproduced above does not have the a warning from the Magistrate about the existence of minimum mandatory sentence under section 27 of the Penal Code Act, Section 9 Criminal procedure Code and section 36 of Penal Code. The Court of Appeal in the **RODDY LENCLUME** cited above, stated to the effect that "*the appellant need to be informed of the seriousness of the charge of burglary which attracted a minimum mandatory term of 10 years imprisonment. The appellant has also not been informed of the provision of section 9 of Criminal Procedure Code ….the appellant had been sentenced to a consecutive term of imprisonment he had not been informed by the learned Magistrate of the man*datory *provision* of *section 36 Penal Code.."*

[10] Earlier on, the Supreme Court, per Allear Chief Justice in the case of **ETHEVE VS REPUBLIC S.C.SC 15/06**, had stated that " *I believe in every case where legal and unrepresented person appears before Court and wishes to tender a plea of guilt to an offence, the presiding officer is under a duty to inform the person about the consequences of the plea especially if he is minded to impose a custodial sentence or if there are mandatory sanctions that will necessarily follow…"*

[11] It is obvious form the above two cases by this Court and the Court of appeal that, the learned trial Magistrate still erred not to have explained the consequences of a plea of

guilty to the appellant as he was not legally represented before he called the appellant to plead to the charges, as they had minimum mandatory sentences.

[12] As to the severity of the sentences the appellant had pleaded guilty on both counts. It is now settled that this attracts a 20% reduction on the sentence under the relevant offended provision of the law. **(SEE ARCHBOLD 2012 Ed. Par 5-112).** It appears from the record that offences in both counts were committed in the same transaction. Same day, same place, same area same victims. This also would tend to attract a concurrent instead of a consecutive sentence.

[13] All in all I make the following holding:-

a) The learned trial Magistrate had adequately explained to the appellant his Constitutional rights under Article 19 (2) (d) of the Constitution regarding legal representation. However, he failed to explain to the appellant the impact of a plea of guilty having regard to the provision of section 27 and 36 of Penal Code Act and section 9 of criminal Procedure code, regarding the existence of the minimum mandatory sentence . He also never explained the effect of section 30 (a) of the Penal Code to the appellant regarding the payment of compensation to the victim. (see Court of Appeal of **RODDY LENCLUME** case above para 21 of their Lordship's judgment).

b) It appears from the **RODDY LENCLUME,** that failure to explain the effect of section 27, 36 , 30 (a) of the Penal Code and 9 of the Criminal Procedure Code does not render the trial a nullity, as their Lordship's never held so in the case before them.

c) Having quashed the sentence of 16 years imposed on the appellant due to the lack of jurisdiction under 6 (2) of Criminal Procedure Code and putting into account the proportionality of the sentences and noting the mitigating factors raised by the

defence and also at the same time taking into consideration the fact that the property stolen amounted to a total of SR 38,995, which appears was never recovered, also taking into account the prosecutors list filed in Court showing that the accused had 8 previous records 5 of which were similar or related to the offences like the ones he had been convicted, I make the following orders regarding the sentence. I reduce 12 years to that 8 years imprisonment on the first count. As to the second count, I will not interfere with the sentence of 4 years imposed by the learned trial Magistrate, as it is appropriate in the circumstances of the case. However, the sentences on both counts are to run concurrently which means the appellant will serve a total of 8 years imprisonment.

d) The appellant has in addition to the 8 years imprisonment, he will have to pay under section 30 (A) of the Penal Code Act compensation to Mr Richard Pillay a sum of 38, 995/-. This order will take effect at expiration of the appellant's term of imprisonment and shall be paid within two years of his released from the prison. Appellant is hereby informed that the failure to comply with the compensation order without reasonable cause is an offence.

[14] Order accordingly.

Signed, dated and delivered at Ile du Port on 24 April 2015

D Akiiki-Kiiza
Judge of the Supreme Court