# IN THE SUPREME COURT OF SEYCHELLES

## Criminal Side: CN 95/2013

**Appeal from Magistrates Court decision 304/2013**

**[2015] SCSC 221**

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**JEFFREY PAUL LEON**
Appellant

versus

**THE REPUBLIC**

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| Heard: | 20 April 2015 |
| Counsel: | Mr Gabriel for appellant |
| | Mr Thachet, Attorney General for the Republic |
| Delivered: | 1 July 2015 |

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**JUDGMENT**

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**Akiiki-Kiiza J**

[1] This is an appeal from the judgment and orders of the trial court dated the 24/09/13 whereby the appellant was convicted on a charge of Breaking into a building an committing therein a felony contrary to section 291 (a) and section 260 of the Penal Code. He was sentenced to a term of 10 years imprisonment. He was dissatisfied with the above orders and has now appealed to this Court on the following grounds:-

a) Against conviction

(i) That the learned Senior Magistrate erred in convicting the appellant in his absence.

(ii) That the learned Senior Magistrate misdirected herself when convicting the appellant on a defective charge sheet and insufficient evidence.

(iii) That in all circumstances the conviction of the appellant was unsafe and unsatisfactory.

b) Against sentence

a) That the sentence of 10 years imprisonment by the learned senior Magistrate was wrong in principle.

b) That the learned senior Magistrate failed to consider a sentence that falls below the minimum limit of her jurisdiction.

[2] He prayed for the quashing of both the conviction and the sentence.

[3] At the hearing of this appeal, Mr Nicol Gabriel appeared for the appellant and Mr Thachet appeared for the Respondent/ Republic.

[4] Mr Gabriel submitted to the effect, that the judgment should not have been read in the absence of his client and that, the charge was defective and should have included section 23 in the charge and was not individual in nature. Also that the sentence was harsh and should be quashed.

[5] On the other hand Mr Thachet submitted to the effect that the appellant had been warned to attend Court but he decided to absent himself, hence he is deemed to have consented to the proceedings to go ahead in his absence. He relied on article 19 (12) of the Constitution and section 133 A of the Criminal Procedure Code for his contention.

[6] As to the Right of Appeal to be explained to him, it was Mr Thachet submission that this was done by the trial Court. As to the inclusion of section 23 in the charge, it was his submission that, the appellant was charged separately in the first count and the others had

been charged separately in the second count and that the offences were not the same. Hence there was no need to treat all the accused persons as joint offenders.

[7] As to this severity of the 10 years imprisonment he said that he maximum sentence was 14 years for the offence of breaking into a building contrary to section 291 (a) of the Penal Code. Hence 10 years was reasonable in the circumstances considering the provisions of section 27 (1) ( c) of the penal Code on minimum mandatory sentence and that there were no exceptional circumstances to warrant the imposition of less than the mandatory minimum sentence of 10 years. He prayed for the dismissal of the appeal.

[8] I will examine the appellant's submissions in the order his counsel had argued them.

[9] Regarding the necessity to have included section 23 in the charge, a careful perusal of the charge brought against the 3 accused persons indicate that, the appellant was charged of Breaking into a building and committing a felony therein contrary to section 291 (a) of the Penal Code as read with section 260 of the same code at the first count. On the other hand, the 2 colleagues Robert Lai Lam and Rolland Lai lam, were charged in the second count with Retaining Stolen Property contrary to section 309 (1) as read with section 23 of the Penal Code. These 2 individuals were not named in the first count. In the case of **AMELIE BILDERS VS REPUBLIC [2013] SLR 511** the Seychelles Court of Appeal cited with approval the case of **R VS AYRES [184] AC 447** at 461 that:

***" if the statement and particulars of the offence can be seen fairly to relate to and to be intended to charge a known and subsisting criminal offence but plead it in terms which are inaccurate, incomplete or otherwise imperfect, then the question whether conviction on that indictment can properly be affirmed under the proviso must depend on whether, in all circumstances it can be said with confidence that the particular error in the pleading cannot in any way have prejudiced or embarrassed the defendant"***

[10] In a more recent case by the same Court, their Lordship's had the following to say:-

***"We also have to consider whether the failure to add section 22 of the Penal Code to the charge sheet is fatal. Mrs Muzaffer has submitted that the fact that the charge did not especially refer to 22 of the Penal Code does not render it defective nor does it***

*offend section 111 of the Criminal Procedure Code...We agree with her that the omission of section 22 and section 23 from the charge sheet does not render the charge faulty or bad in law..... Both section 22 and section 23 are evidentiary provisions. They are also procedural provisions that specify the exact offence with which the accused persons are charged with and it is highly advisable that they be included in particulars of the offence with more than one accused person. It would certainly make for better clarity"* **(See MOHAMED HASSAN ALI & 3 ORS VS THE REPUBLIC S.C.S Cr app 22 /2012).**

[11] Applying the above cases to this appeal it is the law that unless there is a prejudice suffered or embarrassment caused to the appellant the mere inclusion of inaccurate, incomplete or otherwise imperfect terms in the statement of the offence and the particulars thereof does not necessarily render a conviction on appeal null and void, unless the appellant was prejudiced or embarrassed by the omission or imperfection.

However as we have seen the circumstances of this case are different from the situations referred to by the Court of Appeal in the two cases I have above in that the appellant was charged separately with a different offence in separate counts from his two other colleagues. In the circumstance, I find the charge in the Lower Court was not defective, by not including section 23 in the statement of the offence in count 2.

[12] As to whether the appellant was convicted in his absence, the trial Court record shows the following entries:-

*"22/10/2012*

***Republic:*** ***Mr. H. Ally.***

***Accused 1:*** ***Present and unrepresented.***

***Accused 2:*** ***Present and unrepresented.***

***Accused 1:*** ***Still not have money to pay lawyer."***

Then the learned trial Magistrate took the plea whereby the appellant eventually pleaded not guilty to the first count there is a following entry on the record:-

"Court: ***Trial on 23/01/13 at 9 a.m half day and both accused are released on same bail conditions and failure of their appearance on next trial date, case to proceed in their absence".***

[13] On 23/01/13, the appellant was absent and the trial Magistrate went ahead to hear the matter in his absence in line with here order of 22/10/12. A warrant of arrest was also issued against him. Then on the 23/10/13 about 9 months later from the date the warrant of arrest was issued against him, the following entry was made on the lower Court record:-

***" 23/09/13***

***Republic: Mr Revera***

***Accused Number 1: Present and unrepresented.***

***Court: Informs accused that case (had)proceeded in his absence and judgment pending and why did not he appear.***

***Accused Number 1:- Relationship between me and my wife.***

***Court: Reasons given for not appearing on the date fix for trial is untenable in all the circumstances of the case and hence the judgment maintained as per proceedings of trial conducted in absences of accused.***

***Court: Accused informed as judgment of Court of the 26/08/13.***

***Court to accused:- Any mitigation.***

***Accused:-"Seeks excuse other persons also involved, 39 years old stevedore, 3 kids not residing with me".***

***Court:*** ***Sentence reserved till 24/10/13 at 9 a.m . Accused remanded at Montagne posse..***"

[14] The judgment of the Court is dated the 26/08/13 and was read on the 24.09/15 and he was sentenced to 10 years imprisonment. It appears the learned trial Magistrate did not inform the appellant about his right of appeal to the Supreme Court if he so wished.

It is my considered view that, the learned trial Magistrate was right to proceed in the absence of the appellant, as he had been informed of the trial date that the case will start on the 23/10/2013 and in addition he was warned that if he does not appear the case would proceed without him. He did not show up on that day. No reason was given for his non attendance, till his arrest almost 9 months later. This situation is covered by section 133 A (1) of the Criminal Procedure Code and Article 19(12) of the Constitution. When he eventually appeared in Court, the reasons he gave for his absence for 9 months were found unreasonable and inexcusable by the learned trial Magistrate. She decided not to re open the case.

[15] It is my considered view, that, the unexplained absence of the accused person on the day he had been told that the case will be heard, coupled with his continued absence for almost 9 months, amounted to a conduct which rendered the hearing of the case in his presence impracticable within the meaning of article 19 (2) (i) of the Constitution.

[16] As to the judgment being delivered in his absence, the trial Magistrate appears to have delivered the judgment twice. The first delivery was on the 26/08/13 in absence of the accused person. Then on the 23/09/13 when the appellant had been arrested, the Magistrate said:-

"**Court:** ***Accused informed of judgment of the Court of 26/08/13".***

This in my view can only mean that, she read the judgment again to the appellant person and this time in his presence. She then adjourned the case to 24/09/13 for sentence.

[17] It is my considered view that, the second reading of the judgment cured any defects which might have arisen under section 142 (1) of the Criminal Procedure Code which

necessitates the presence of the accused when the judgment is being read. It is also interesting to note the provision in section 142 (3) of the Criminal Procedure Code provides as follows:-

"*142 (2)*

*No judgment delivered by any Court shall be deemed to be invalid by reason only of the absence of any party or his advocate on the day..., or of any omission to serve ....the parties or their advocates or any of them, the notice of such day and place* ".

This provision in my view validates the judgment first read in the absence of the appellant.

I am aware that the lower court record is devoid of the note from the Magistrate showing that he had explained to the appellant his right of appeal in accordance with section 142 (4) of the criminal Procedure Code. However, I do not think the appellant was prejudiced by this omission, as he duly filed his appeal within a month of his conviction and sentence. His notice of appeal was received in this court Registry on the 13/11/13. He had written it on the 15/10/13. Hence it is my finding that the failure of the learned trial Magistrate to comply section 142 (4) of the Criminal Procedure Code is not occasion any miscarriage of justice or in any way prejudiced the appellant.

[18] As to the severity of the sentence imposed on the appellant, the maximum sentence under section 291 (a) of the Criminal Procedure Code is 14 years. The learned trial Magistrate sentenced him to 10 years imprisonment after a full trial. In her ruling on sentence she noted the mitigation of the appellant. She appeared however, to have felt bound by the minimum mandatory sentence of 10 years, and she felt that there were no exceptional circumstances to warrant her impose a lesser sentence than the mandatory minimum. A close perusal of the record indicates that the appellant was a first offender. The prosecutor said so, on the 26/08/13. Also the record shows that 13 of the 14 bags of the shark fins stolen by the appellant were recovered and returned to the owner. He also had 3 kids and had problems with his wife and had prayed for mercy.

[19] It is my considered view that, in those circumstances the appellant deserved a lesser sentence than the minimum mandatory imposed by the learned trial Magistrate within the principles of **PONOO** case. In the premises I quash the sentence of 10 years, and substitute that with 7 years imprisonment.

[20] All in all, the appeal against conviction fails in totality, and the appeal against sentence succeeds to the above extent.

Order accordingly.

Signed, dated and delivered at Ile du Port on 1 July 2015

D Akiiki-Kiiza
**Judge of the Supreme Court**