IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 45/2014

Appeal from Magistrates Court decision 167/2012

[2016] SCSC 786

DANIEL CADEAU
Appellant

versus

THE REPUBLIC

Heard:	23rd September 2016
Counsel:	Mr. N. Gabriel for appellant
	Ms. A. Faure, State Counselfor the Republic
Delivered:	7th October 2016

JUDGMENT

Akiiki-Kiiza J

[1] This is an appeal from the Judgment and Orders of the Magistrate's Court dated the 04/08/14, whereby the appellant was convicted of the offence of Breaking and Entering into a building and committing a felony therein *Contra Section to Section 289 (a) of the Penal Code*. He was sentenced to a term of 6 years imprisonment.

[2] His memorandum of Appeal has 2 parts;

1. Appeal Against Conviction
   a) That the learned trial Magistrate erred in law and fact in convicting the appellant in absence of any evidence of breaking and entering into the building.
   b) That the learned Magistrate erred in law and in fact in convicting the appellant on insufficient and uncorroborated evidence.
   c) That in all circumstances of the case, the conviction of the appellant was unsafe and unsatisfactory.

2. Appeal Against Sentence
   a) That the sentence passed in the absence of the appellant is a nullity.
   b) That the sentence of 6 years imposed on the appellant is manifestly harsh, excessive and wrong in principle and in law.
   c) That the learned trial Magistrate erred in not considering the mitigation of the appellant.

He wants this Court to allow the appeal and quash the conviction, set the sentences aside.

[3] At the hearing of the appeal, Mr. Nicole Gabriel represented the appellant and Ms. Faure represented the Respondent.

Mr. Gabriel essentially submitted that there was no evidence of Breaking and Entering on the record. However, according to PW1, when he arrived at his work place on the material day, he noticed that the window of the tea room had been broken and there was broken glass inside on the floor and door mat was missing.

Also when he went next door, he saw the filing cabinets were opened and an empty box for bottles of brandy was on the floor. The brandy had gone. He also saw 2 envelopes which had contained SR 13, 585.00/- (Thirteen Thousand Five Hundred and Eight Five Rupees) on the floor. The money was missing. Also the drawer of his desk had been broken into. It is my considered view that this evidence clearly showed that there had been a Breaking and Entering in the office of PW1.

In the premises therefore, the first ground of appeal against conviction fails.

[4] As to whether, there was sufficient evidence on record to justify the appellant's conviction, the Lower Court Record shows that the learned trial Magistrate had relied on circumstantial evidence to convict the appellant. This is so as there was no direct or eye witness account implicating the appellant in the crime.

[5] The first set of circumstantial of evidence is in regard to a finger print found inside the broken into premises. It was held in the case of **R Vs Court [1960] 44 Cr App P 242,** that identification by a finger print expert of a single finger print found at the scene of the crime could be sufficient by itself to found a conviction. (See also **SHANE BONIFACE VS THE REPUBLIC CN 1/14).**

In this particular case the appellant's fingerprint was lifted from outside a refrigerator which was inside the premises.

[6] Mr. Gabriel submitted to the effect that, the presence of the appellant's finger print on the refrigerator was of no consequences as he had been working at the premises of SFA.
However Ms. Faure submitted to the effect that the appellant's job at the SFA was of casual nature, and that he had limited access, if at all, inside the premises. Hence the finger print could not be expected to be on the refrigerator inside the premises.

[7] The learned Magistrate on his part believed the prosecution witnesses, regarding the fingerprint. He saw these witnesses testifying. They impressed him as truthful and he believed them. I see no valid or sound reason to hold otherwise. The evidence showed that, the appellant as a casual worker, carried out odd jobs around SFA. PW1 had offered him a 3 day per week job to clean the Providence Port. There is no evidence on record to show that his job description included entering the premises and handling the refrigerator. In the premises therefore, his fingerprint could not have been put there by virtue of his employment.

[8] Another piece of circumstantial evidence tending to implicate the appellant is the finding of the shirt belonging to him at the scene of the crime. The appellant accepted that that shirt was his. There was no plausible explanation on the record to show how it came to the scene.

[9] In the above circumstances, it is my considered view that the learned trial Magistrate was within his mandate to convict the accused as the culprit. The second ground of appeal therefore also fails.

[10] As to whether the sentence passed against the appellant in his absence was a nullity, Mr. Gabriel cited the case of **The Republic Vs Mathiot [1991] SLR 138** where Perera J, as he then was, quashed a conviction where the trial Magistrate had sentenced an accused to 24 months in prison with an option to pay a fine of R1000.00 (One Thousand Rupees). The learned Judge rightly held that, the sentence was, illegal because, *Section 27 (2) of the Penal Code*, provided for:

> *" A person liable to imprisonment may be sentenced to pay a fine in addition to or instead of imprisonment"*

The law did not provide for an option for the convict to choose whether to pay the fine or serve the term of imprisonment. It is the Court which chooses, what the convict will undergo. Either for him to pay the fine or serve a term of imprisonment, or both. Hence clearly the learned trial Magistrate in the **Mathiot case** erred to leave it to the accused to choose which option to take.

[11] Justice Perera in addition, had found that the sentence was passed in the absence of the accused person, and as a result, he quashed the conviction and remitted the case to the trial Magistrate to impose a proper sentence.

A somewhat similar situation came before this Court in the case of **JEFFREY PAUL LEON VS THE REPUBLIC [2015] SCSC 221**

In that case the judgment was passed in the absence of the accused person. The accused had absented himself on numerous occasions despite the fact that he knew the date of hearing and the day for judgment.

In that case, the Court held that , the unexplained absence of the accused person on the day he had been told that the case would not be heard, amounted to a conduct which rendered the hearing of the case in his presence impracticable within the meaning of *Article 19 (2) (1)of the Constitution.*

[12] As for the delivery of judgment, the learned Magistrate delivered it twice. The second time was after his arrest following the issuance of warrant of arrest on his respect.

Secondly, the reading of the judgment in absence of an accused person is covered by *Section 142 (3) of the Criminal Procedure Code*, which validates a judgment read in absence of a party or his advocate.

[13] In the instant case, the judgment was read on the 19/05/14 in presence of the appellant. The learned trial Magistrate adjourned the case for mitigation but the accused never turned up. Thereafter he adjourned the case for sentence again and again but the appellant never turned up though his counsel, Mr. Durup, was always present on each occasion. Out of frustration, the learned Magistrate finally decided to read out the sentence in the absence of accused but in the presence of counsel.

Section 142 (4) of the Criminal Procedure Code provides as following:

> *" At the time of any Conviction by the Magistrate's Court, the Magistrate shall, where a right of Appeal exists, inform the convicted person of his right of Appeal and the Magistrate shall there upon record that he had complied with the provisions of this section, sign such note, and date it"*

[14] In the instant case, the judgment was read in the presence of the appellant and his counsel. This was on the 19/05/14 (See also Page 125 of the hand written proceeding of trial Court).

However, the learned Magistrate did not endorse on the record that he had explained the right of appeal to the appellant as there is no note to that effect on the Lower Court Record. This is contrary to *Section 192 (4)of the Criminal Procedure Code*.
The sum total of the irregularities are 2 fold;

i. The learned trial Magistrate did not inform the appellant after convicting him his rights of Appeal within the meaning *of Section 142 (4) Criminal Procedure Code*.

ii. Although *Section 142 (4) of the Criminal Procedure Code* talks of a Conviction and not a sentence, the practice is that, the Right of Appeal is always explained to the accused after the imposition of the sentence.

Hence it is my considered view the word conviction in *Section 142 (4) Criminal Procedure Code*, must of necessity include the sentence.

[15] The case of **JEFFREY PAUL LEON** cited above is different from the instant one in that, the Magistrate had read the judgment and sentence twice to the accused person, the second time was after his arrest. However, in the instant case, there is no evidence on the Lower Court Record to that effect.
This violates *Section 142 (4) 2 Criminal Procedure Code*. This means the third ground of appeal succeeds.

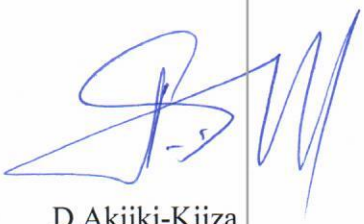
[16] The Court in the **Mathiot case** ordered that, the case be remitted back to the trial Court for the proper imposition of the sentence. I do likewise here. This file is to be remitted to the trial Magistrate for the conformity with the provision *Section 142 (4) Criminal Procedure Code.*

[17] I will not consider the ground of appeal with regard to the severity of sentence as the sentence imposed was a nullity.

[18] All in all this appeal succeeds to the above extent. The appeal against conviction is however dismissed.

It is so ordered. R/A explained.

Signed, dated and delivered at Ile du Port on 07/10/16



D Akiiki-Kiiza

Judge of the Supreme Court