IN THE SUPREME COURT OF SEYCHELLES

CriminalSide: CN 6/2016

Appeal from Magistrates Court decision 184/2015

[2017] SCSC 565

ALLAIN PATRICK PILLAY
Appellant

versus

THE REPUBLIC

Heard:

Counsel: Mr. N. Gabriel for appellant

Ms. M. St. Ange , State Counselfor the Republic

Delivered:

JUDGMENT

Vidot J

[1] The Appellant was charged with the offence of Possession of a controlled drug contrary to Section 6(a) as read with Section 26(1)(a) and punishable under Section 29(1) of the Misuse of Drugs Act.

[2] The particulars of the offence are that on 27th February 2014, the Appellant, then a resident of St. Louis, at Belonie, Mahe was found in possession of 0.01 grams of heroin, a controlled drug.

[3] The Appellant is appealing against both conviction and sentence.

Ground of Appeal against Conviction

[4] The ground against conviction reads as follows;

The Learned Magistrate failed to consider the fact that the Appellant did not appreciate the nature of the charge levelled against him and pleaded guilty on a misapprehension of the law and facts.

[5] At the trial, the Appellant did not have legal representation. He agreed to take a plea after his rights were explained to him, to which he had responded; "*I would defend myself*", and he pleaded guilty. When the facts were narrated to him he had replied; "*It is true*". In mitigation he said he had nothing to state. It is the Appellant's submission that that the conviction was unsafe because the Appellant pleaded guilty on a misapprehension of the law and the facts, especially since he did not have legal representation. The Appellant it is submitted was not warned of the severity of sentence for such an offence. Learned Counsel refereed to sections 181 (1) and (2) of the Criminal Procedure Code.

[6] The Republic in response raised an objection on a point of law by referring to Section 309(1) of the Criminal Procedure Code which reads thus;

" No appeal shall be allowed in the case of an accused person who had pleaded guilty and has been convicted on such a plea by the Magistrate Court, except as to legality of sentence"

Learned Counsel for the Republic cited **Payet v R (1981) SLR 31** which held that a person who has been convicted on a guilty plea may appeal on sentence only.

[7] **Payet v R** (supra) sets out the general rule. The Appellant nonetheless may appeal in circumstances where the guilty plea was obtained due to some legal or procedural irregularity. This is the ratio in **Paul Oreddy v Republic SCA 9/2017** where it was held that it "*is trite that one cannot appeal against a plea of guilty entered. However, it should be distinguished between a plea of guilty freely and unequivocally entered and one that is*

obtained through inducement or coercion." In this case the contention by the Appellant is an alleged misapprehension of law and fact.

[8] The Appellant has not substantiated the allegation that he laboured under a "misapprehension of law and fact". The Appellant was informed of his constitutional rights. He was informed of his right to legal representation guaranteed under Article 19 (2) (d) of the Constitution, and he freely exercised the right not to avail himself of that right. Thereafter, his plea was unequivocal and the record does not suggest that he did not appreciate the facts of the case as put to him and elected to accept them. From the action of the Appellant as per record of proceedings, it shows that the Appellant was in no doubt as to the plea he wanted to enter. Furthermore, I believe that a person who so willingly decided to enter a plea of guilty and elected not to have a lawyer present would first have appreciated the prescribed penalty that could be imposed.

[9] The Magistrate court is not a court of records but yet I will impress that it is most important that matters pertaining to recording of plea and explanation of constitutional rights are more expressly recorded. However, in the present case, I find that there was no miscarriage of justice; see Section 344 of the Criminal Procedure Code. Any omission did not occasion a miscarriage of justice in the circumstances. In terms with Section 309 of the Criminal Procedure Code, I declare that no appeal on conviction should be entertained in the circumstances and therefore, ground 1 of the Memorandum of Appeal is dismissed.

Ground of Appeal against Sentence

[10] The Appellant claims that the sentence imposed is manifestly harsh and excessive and wrong in principle. Counsel for the Appellant argued that the sentence was out of proportion with the amount of drugs involved. He referred to **Kelson Alcindor v Republic** whereby the court applied the principle of "la peine la plus douce" in view of the change in the law. However, this Court notes that the sentence was imposed before the promulgation of the Misuse of Drugs Act 2016 (MODA 2016). Therefore, the court could not at that time applied the principle in **Kelson Alcindor**. However, it is clear that the Magistrate applied the principle established in **Ponoo v The Attorney General SCA**

38/2010. Prior to MODA 2016, the prescribed sentence for such offence was a mandatory minimum term of imprisonment of 5 years and the maximum was 15 years and a fine of SR300,000/-. The sentence imposed was 6 months imprisonment suspended for one year and a fine of SR10,000/- and in default 3 months imprisonment.

[11] The Republic in supporting the sentence submitted that the Learned Magistrate exercised the discretion as provided by Section 26(2) of the Penal Code. That section provides for imposition of fine in addition or in lieu of imprisonment. In **Fernando v Republic CR12/2000** (unreported) held that a trial court is entitled to impose sentences of imprisonment for default of payment of fines. Counsel for the Republic cited **R v Mathiot [1991] SLR 134**, argues that the choice of sentence is to be decided by the Magistrate and not the offender and that in this case the sentence was within the powers of the Learned Magistrate. Learned Counsel also correctly noted that as per section 28 of the Penal Code, the court could order a default sentence. She relied on **R v Marday & Anor [2004] SLR 106** and laid emphasis that since drug offences are serious due its destructive effect on society, it should be treated with severity.

[12] It is trite that an appellate court should not interfere with a sentence meted out by a lower court unless the sentence imposed is wrong in law and/or in principle or some material factor was overlooked or that the sentence is manifestly harsh and excessive; see, **Mathiot v Republic SCA 9 of 1993.** It is necessary to note as well, that the classic principle of a sentencing is deterrence, prevention, rehabilitation, reformation and retribution; see **Lawrence & Another v Republic [1990]SLR 47**. However, a sentence should always conform to law and be just and fair and the punishment should meet the criminal as well as the crime as pronounced in **S v Van ser Westhuizen [1974] (4) SA 621** and **S v Sparks 1972 (3) SA 396.**

[13] It is without doubt that the sentence imposed by the Learned Magistrate was within the law. In fact the Learned Magistrate applied the principle established in **Ponoo v The Attorney General SCA 38/2010** and imposed a sentence that was below the mandatory minimum. The sentence was lawful and in the circumstances not harsh and excessive. However, with the enactment of MODA 2016, a new approach was adopted in dealing

drug offences, in particular with the offence of possession. The Act in fact made provisions to review sentences of those who were convicted under the former Misuse of Drugs Act. I am willing to accord the Appellant similar benefit in this instance. In light with the spirit of MODA 2016, I find the sentence to be excessive, considering the minute amount of drug involved.

[14] Therefore, the ground of appeal against sentence succeeds to the extent that the fine is reduced from SR10,000/- to SR6,000/- but the penalty for default and the suspended sentence remain unchanged.

Signed, dated and delivered at Ile du Port on 3 July 2017

M Vidot
Judge of the Supreme Court