SUPREME COURT OF SEYCHELLES

Reportable
[2019] SCSC 40
CN 23/2017
(Appeal from 58/2014)

In the matter between:

TED CHANG-PEN-TIVE **Appellant**
(rep. by Nichol Gabriel Attorney at Law)

and

THE REPUBLIC **Respondent**
(rep. by Evelyne Almeida State Counsel))

Neutral Citation: *Chang-Pen-Tive v Republic* (CN 23/2017) [2019] SCSC (30 January 2019).
Before: Burhan J
Summary: Section 181 (1) and (2) and Section 129 of the Criminal Procedure Code, Admission of facts by Counsel at time of Plea on behalf of the accused not fatal to conviction.

Heard: 15 October 2018 and 5 November 2018
Delivered: 30 January 2019

ORDER

On appeal from the Magistrates' Court Seychelles the Appeal against conviction dismissed. The appeal against sentence in respect of Count 1 upheld sentence reduced to 5 years. The appeal against sentence in Count 2 dismissed.

JUDGMENT

BURHAN J

1) The appellant was charged in the Magistrates' Court as follows:

Count 1

Burglary Contrary to and Punishable under Section 289 (a) of the Penal Code

Ted Chang-Peng-Tive residing at Anse La Mouche, Mahe, in the early morning of the 7th February 2014, at Au Cap, Mahe, broke and entered into the dwelling house of Robin Vel being occupied by Mr Mandor Prohastka with intent to commit a felonly, therein, namely stealing.

Count 2

Stealing from Dwelling House Contrary to Section 260 and Punishable under Section 264 (b) of the Penal Code

Ted Chang-Peng-Tive residing at Anse La Mouche, Mahe, in the early morning of the 7th February 2014, at Au Cap, stole 1 mobile phone make Iphone IV colour Black value 400 euro being the properties of Mr Mandor Prohastka.

2) He was convicted on his own plea of guilt and sentenced on the 21 March 2014, to a term of seven years six months on Count 1 and to a term of two years six months on Count 2. It was further ordered that both sentences run concurrently.

3) This is an appeal from the said conviction and sentence based on the following grounds:

   1) *"The learned Magistrate erred in law in having admitted the facts pertaining to the plea of guilty of the appellant when in actual fact it was the appellants attorney who had admitted the facts contrary to law".*

   2) *"The total sentence of seven years and six months imposed by the learned Magistrate is manifestly harsh, excessive and wrong in practice".*

4) When one considers the facts relevant to this case the proceedings indicate that the substance of the charge as required by section 181(1) of the Criminal Procedure Code (CPC) was put to the accused and the accused himself pleaded guilty to the said charge. Section 181(1) reads as follows:

1) *The substance of the charge or complaint shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.*

2) *If the accused person admits the truth of the charge, his admissions shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there shall appear to it sufficient cause to the contrary.*

5) Learned Counsel for the respondent drew the attention of Court to section 114 (a) (i) read with section 114 (a) (iii) of the CPC that refers to "the charge" including the statement of offence and the particulars of the offence set out in the charge sheet. There is no challenge by the appellant that this procedure was not followed and the record bears out the fact that the accused in his own words stated he was guilty of the said offences, thereby admitting the truth of the charge as required by section 181(1) of the Criminal Procedure Code as borne out by the proceedings. The proceedings indicate that the appellant was represented by Learned Counsel Mr. Gabriel throughout the taking of the plea under section 181(1). It follows that the appellant was acting on the legal advice given to him by his Learned Counsel.

6) Following the procedure as set down by Practice Direction 1 of 1971 issued by the then Chief Justice, thereafter, in addition to the substance of the charge and the plea of guilt of the appellant being recorded, prior to conviction, the facts and circumstances of the offence as required by the said practice direction were explained to the appellant and Learned Counsel Mr. Gabriel for the appellant accepted same on behalf of his client. It is this fact that learned Counsel for the appellant Mr. Gabriel the same counsel who appeared for the appellant and admitted the facts in the Magistrates' Court on the 7th of March 2014, now over 3 years later seeks to challenge. His challenge in appeal is that the appellant should have accepted the facts and not him as per the case law referred to by him and as this procedure was not followed, the appellant should succeed in this appeal. Learned Counsel Mr. Gabriel has not averred, specified or referred to any error on his part in accepting the facts or that he was acting contrary to instructions given to him by the appellant, resulting in an injustice or any miscarriage of justice.

7) It would be pertinent at this stage to refer to section 129 (1) and (2) (d) and (3) of the CPC referred to by Learned Counsel for the respondent which reads as follows;

> *1) Subject of the provisions of this section any fact of which oral evidence may be given in any criminal trial may be admitted for the purpose of that trial by or on behalf of the prosecutor or accused person and the admission by any party of any such fact under this section shall as against that party be conclusive evidence in that trial of the fact admitted.*
>
> *2) An admission under this section –*
>
> > *a)* ....
> >
> > *b)* ....
> >
> > *c)* ....
> >
> > *d) if made on behalf of an accused person who is an individual, shall be made by his advocate;*
> >
> > *e)*.........
>
> *3) An admission under this section for the purpose of proceedings relating to any matter shall be treated as an admission for the purpose of any subsequent criminal proceedings relating to that matter (including any appeal or retrial)*

8) Therefore it is apparent <u>the law provides that the facts and circumstances</u> referred to in the practice direction 1 of 1971, be admitted either by or on behalf of an accused by his advocate even though the practice direction only refers to the accused himself having to admit the facts and circumstances. It is clear that the practice direction which is subject to the law is to ensure that the accused person even when unrepresented by Counsel, clearly understands the nature of his plea, prior to conviction and the Learned Magistrate entering the conviction, is satisfied that the accused plea is unequivocal and not subject to a legal defence and not conditional in nature.

9) Learned Counsel for the appellant refers to the case of **Raymond Tarneki v Republic SCA Cr. App 4 of 1996.** In the said case the appeal that a miscarriage of justice had occurred by Learned Counsel accepting the facts was prompt as the accused was a foreigner with little knowledge of the local laws. In this instant case other than the technical nature of the appeal, Learned Counsel does not refer to the fact that any miscarriage of justice had occurred to his client as a result of him inadvertently admitting the facts on behalf of his client. I am inclined to agree with Learned Counsel for the respondent that Learned Counsel Mr. Gabriel owes a duty not only towards Court but towards his client to promptly bring any error (if any) made by him which he has failed to do in this instant case. Further as mentioned earlier the appellant himself pleaded guilty to the charge when it was read over to him. Therefore having considered the facts peculiar to this case, I am of the view that the acceptance of facts by Counsel on behalf of the appellant at the time of the plea being taken is not fatal to the conviction.

10) I also draw attention to section 309 (1) of the CPC which reads as follows:

> 1) *No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by the Magistrates' Court, except as to the extent or legality of the sentence.*

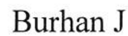
11) For the aforementioned reasons I dismiss the appeal against conviction.

12) I will next proceed to consider the sentence imposed by the Learned Magistrate. The appellant was sentenced on Count 1 to a term of 7 years 6 months imprisonment. Learned Counsel for the respondent has submitted that the Learned Magistrate could have imposed the minimum term of 12 years imprisonment. It is the view of this Court that in terms of section 27 (1) (b) (ii) of the Penal Code, considering the fact that the appellant had previous convictions, the Learned Magistrate could have done so but has chosen to give him a lesser term based on the principles set out in the case of **Jean Frederick Ponoo v The Attorney General SCA 38/2010**. Learned Counsel for the appellant too relies on the principles set down in the said case and the case of **John Vinda v R (1995) SCA (unreported)** to move this Court that the totality of the sentence be considered. It is admitted by Learned Counsel for the respondent that the appellant is not a first offender and has previous convictions,

indicating the appellant will be serving additional sentences to that imposed in this case while Learned Counsel for the appellant in his submissions admits the existence of two other cases i.e. 54 and 59 of 2014.

13) Having considered the above circumstances and the facts set out in the particulars of the offence, I am of the view that a term of 7 years 6 months imprisonment on Count 1, is harsh and excessive. I proceed to set aside the sentence imposed in Count 1 and substitute it with a sentence of 5 (five) years imprisonment. The sentence imposed in Count 2 is upheld. Both sentences to run concurrently. Time served and time spent in remand to count towards sentence.

Signed, dated and delivered at Ile du Port on 30 January 2019



Burhan J