SUPREME COURT OF SEYCHELLES

Reportable
[2019] SCSC 172
CN15/2018
(Appeal from 329/2017)

In the matter between:

MYRIAM HOAREAU Appellant
(rep. by Kelly Lee D'Offay)

and

THE REPUBLIC Respondent
(rep. by Ananth Subramaniam)

Neutral Citation: *Hoareau v Republic (*CN15/2018) [2019] SCSC 172 (11 March 2019)
Before: Burhan J
Summary: Section 166 and 183(g) of the Penal Code. It is the considered view of this Court that in this context 'public nuisance' does not necessarily mean that complaints from several members of the public is a mandatory requirement in order to constitute a public nuisance. This is supported by the example given in section 183 (g) of the Penal Code. The section categorically states that the persistent barking and whining of a dog that would cause or causes annoyance to another person is considered to be a common nuisance. What Court has to consider at his stage, is whether the nature of the nuisance would affect the public in general or the community at large.

Heard: 28 January 2019
Delivered: 11 March 2019

ORDER

Sentence varied. Subject to the variations in the sentence contained herein, the conviction and sentence of the Learned Senior Magistrate is upheld .

JUDGMENT

BURHAN J

[1] The appellant Myriam Hoareau was charged in the Magistrates' Court as follows:

Count 1

Common nuisance contrary to Section 166 as read with Section 183 (g) and punishable under Section 166 of the Penal Code Cap 158.

Particulars of offence are that, Myriam Hoareau of Bel Ombre, Mahe during the months of June and July 2017 at Bel Ombre, Mahe caused a common nuisance to Marlene Moncherry by allowing 13 to 20 dogs on your property therefore causing annoyance to the said complainant by means of loud and persistent barking and whining especially during the night.

[2] The appellant denied the charge and after trial, the appellant was found guilty and was sentenced on the 6th of November 2018. The sentence of the Learned Senior Magistrate Mr. Brassel Adeline reads as follows:

> *"In the circumstances, I sentence the convict, Myriam Hoareau to a term of 14 days imprisonment, which is to be suspended for two months in accordance with section 282 of the Criminal Procedure Code. Pursuant to section 282 (3) (a) the suspension of this sentence is made conditional on the convict removing all the dogs from her premises within two months from the date of this sentence save the four dogs which on the day of the locus inquo, the Court was informed by her are her personal dogs . In[f] the convict fails to meet this condition within the two months period, she will be liable to be brought back to Court and be committed to prison for 14 days."*

[3] The appellant seeks to appeal from the conviction imposed on the following grounds:

(1) The Learned Magistrate erroneously concluded that the nuisance complained of affected the community at large or part of it, when a single unsubstantiated complaint was made about the appellant's dogs by one witness, namely Marlene Moncherry.

(2) The Learned Magistrate erred in his conclusion that certain quantities of dogs are not meant to be kept in residential areas, as no such law to this effect is in operation.

(3) The Learned Magistrate erred in accepting the unsubstantiated evidence of police officer Jean Baptiste at face value, without any documentary evidence of any warning letter or records /logbook entries to support his verbal contention that he carried out an unknown number of patrols in the area during the course of his alleged investigation.

(4) The Learned Magistrate erred in concluding that the requirements under section 183 (g) of the Penal Code were satisfied, especially given the lack of evidence that the accused's dogs barked or whined persistently ((the complainant gave evidence that she telephoned the police on different occasions to report nuisance disturbances in the neighbourhood caused by dogs barking every now and then) and the lack of documentary proof that the accused had received any warning from the police to this effect.

[4] The appellant seeks to appeal against the sentence on the following grounds;

(1)The Learned Magistrate erred in ordering that the dogs kept under the control and in the custody of the appellant shall be disposed of, operated outside the scope of the power afforded to him under the Criminal Procedure Code of Seychelles.

(2)The Learned Magistrate's sentence was manifestly harsh and excessive under all the circumstances of the case.

[5] It would be pertinent, prior to deciding on the grounds relied on by the appellant for the conviction and sentence to be set aside, to first set out the sections of the Penal Code the appellant has been charged with.

[6] Section 166 of the Penal Code reads as follows:

Any person who does an act not authorised by law or omits to discharge a legal duty and thereby causes any common injury or danger or annoyance, or obstructs or causes inconvenience to the public in the exercise of common rights, commits the misdemeanour termed a common nuisance and is liable to imprisonment for one year.

It is immaterial that the act or omission complained of is convenient to a larger number of the public that it inconveniences, but the fact that it facilitates the lawful exercise of their rights by a part of the public may show that it is not a nuisance to any of the public.

[7] Section 183 (g) of the Penal Code:

The following persons commit and are liable to be punished as for a common nuisance –

(g) any person who allows a dog in his custody or under his control to bark or whine persistently after having been warned that such barking or whining causes or would cause annoyance to any other person;

[8] It would also be relevant to refer to the case of **Goldstein [2004] 2 All ER 589 CA para 3** where a public nuisance under the common law was described as follows: ‘ *“A person is guilty of public nuisance (also known as common nuisance) who (a) omits to discharge a legal duty, if the effect of the act or omission is to endanger life, health, property, morals* (deleted by by the House of lords*) or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her majesty’s subjects.”*

[9] The first ground relied on by the appellant as borne out by the written and oral submissions, is that the prosecution has failed to prove that the nuisance was an inconvenience to the public at large. Learned Counsel relies on the fact that as there was only one complainant, it cannot be considered as a public nuisance. It is the considered view of this Court that in this context ‘public nuisance’ does not necessarily mean that complaints from several members of the public is a mandatory requirement in order to constitute a public nuisance. This is supported by the example given in section 183 (g) of the Penal Code as set out above. The section categorically states that the persistent barking and whining of a dog that would cause or causes annoyance to another person is considered to be a common nuisance. What Court has to consider at his stage, is whether the nature of the nuisance would affect the public in general or the community at large. Section 183 (g) of the Penal Code, clearly establishes that the nuisance created by the barking and whining of a dog or dogs falls under section 166 of the Penal Code and is not a private nuisance that attracts only civil remedies but is a Penal offence.

[10] When one considers the evidence given by Mrs. Moncherry (the victim/complainant) there is no doubt in my mind that the persistent barking and whining of not one but several dogs in the compound of the appellant, did cause annoyance and caused much inconvenience to the victim. Further it is the considered view of this Court that the annoyance and inconvenience was of such a nature and degree that it would also have

affected the public in general and the surrounding residential community at large or a part of it. Therefore, the mere fact that there was a single complainant is not a ground to dismiss the charge of common nuisance. Factually, the record indicates that another complainant Joel Malulu had also given evidence in Court complaining of the noise emanating from the barking of the dogs in the house of Myriam Hoareau. Therefore the evidence of the victim stands corroborated by the evidence of Mr. Joel Malulu and cannot be considered to be an "unsubstantiated complaint" as the evidence and investigations of ASP John Baptiste too further corroborates same.

[11] Learned Counsel for the appellant relied on the case of **Agathe v R 1966 SLR N0 3 page 213,** to support his argument that when the conduct affects only the complainant it is not a public nuisance. However the facts of the Agathe case are that the accused went behind the victim saying "*Hey Miss Rosy lips, American is coming"* and *"my darling"* and blown kisses at the complainant. This quite obviously on its facts alone, indicate that the annoyance was directed at a particular individual and not the community at large. Therefore the *Agathe* case bears absolutely no relevance as the facts are different to the facts of this instant case.

[12] Another factor to be taken into consideration is the location where the nuisance was being caused. The Learned Senior Magistrate has therefore correctly in his judgment and his loqus in quo referred to the location, being a residential area where houses were situated occupied by members of the public which clearly further establishes the seriousness and widespread effect of the nuisance. It is my considered view that the constant or persistent barking of the dogs also referred to by witness as ferocious in this instant case, aggravated by the fact that there were a large number of dogs, would have an effect on the tranquillity and peace of mind of the community at large in the neighbourhood. In the case **D.Vikram v Dr. Jayavarthavavelu & Ors Crl.R.C No 1195 of 2009 and M.P. No. 1 of 2009** referring to the case of **Vincent v Union of India AIR 1987 SC 990**, it was held that the barking and howling of dogs in a residential area will certainly spoil the peace and congenial atmosphere of the public in a residential area and that it has been established that barking and howling of the dogs have caused inconvenience and

annoyance to the respondents and other people residing in the locality and therefore, it is a public nuisance.

[13] Learned Counsel for the appellant in Ground 1, refers to a single unsubstantiated complaint being made by the complainant. The evidence of M/s Moncherry speaks otherwise. She had phoned the police and complained not once but many times on several occasions over a period of 5 years to no avail. Her complaint being that a large number of dogs in the premises of the appellant bark nonstop, day, night and morning affecting their sleep and relaxation. The evidence of the complainant further reveals this affected the tourist establishment run by her, two self-catering establishments, as her clients would complain to her when the dogs barked and in one instance she had to refund the money. She further stated that the ferocity of many dogs barking was what affected them unlike the barks of the other neighbourhood dogs. Her evidence is corroborated by the evidence of Dr. Joel Malulu another neighbour himself a veterinary doctor in his evidence under oath too complained of the dogs in the appellant's house. This witness further stated that the appellant's dogs disturbed her more than the other dogs. Therefore for the aforementioned reasons, I see no merit in grounds 1 and 4 raised by the appellant.

[14] The other ground raised by Learned Counsel for the appellant is that the Learned Senior Magistrate erred in his conclusion that certain quantities of dogs are not meant to be kept in residential areas as no law exists to this effect it. Common Nuisance is not dependent on the number of complaints made and in this instant case not on the number of dogs. If one is to take the reasoning of the Learned Senior Magistrate, it is apparent when one reads the judgment and sentence, is that the underlying reason for the Learned Senior Magistrate to order the removal of the dogs in his sentence was in an attempt to abate the nuisance, as the cause of the nuisance was the persistent barking of 13 to 20 dogs. It is apparent that at the locus in quo, the Learned Senior Magistrate observed that the appellant owned 4 of the dogs and the other dogs present numbering 8 were sheltered dogs and therefore in order to abate the nuisance, ordered as a condition to suspending the sentence, that the appellant remove the sheltered dogs which in the considered view of this Court was the obvious step to take. Further, he gave the appellant opportunity to keep her own four dogs whom she would have better control of. The Learned Senior

Magistrate cannot be faulted for ordering same. Therefore ground 2 of the appeal has no merit.

[15] Learned Counsel for the appellant further submits that the Learned Senior Magistrate erred in accepting the unsubstantiated evidence of police officer Jean Baptiste at face value, without any documentary evidence of any warning letter or records/logbook entries to support his verbal contention that he carried out an unknown number of patrols in the area during the course of his alleged investigation.

[16] When one considers the evidence of ASP Jean Baptiste, he states that he had gone to the house of the appellant on receiving complaints on more than one occasion from Ms Moncherry and refers to 13 dogs being present in the house of the appellant when he first inspected the premises. He states even having warned her in writing on further complaints being received, he had gone to the premises of the appellant once again at a time she was not in and seen about 20 dogs and in his evidence states, he had gone to her premises many times**.** It is the view of this Court that in keeping that many dogs the appellant ought to have known and been aware the probability of a public nuisance being caused. It is sufficient for the prosecution to show that the defendant knew or ought to have known, because the means of knowledge were available to him that as a result of his action or omission a public nuisance would occur. **R Shorrock [1994] Q. B 279 Shorrock.**

[17] In his evidence, ASP Mr. Jean Baptiste states he warned her in writing, a fact not denied in cross examination as it appears the said the letter was shown to the witness during cross examination. Therefore, it cannot be said that the evidence of witness Jean Baptiste was not substantiated on this important issue as it is clear when one peruses the proceedings that the defence admits receipt of the warning letter and shows it to witness ASP Jean Baptiste (refer proceedings of 8 June 2018 at page 12). It is not necessary for the officer to produce written records of the fact that he patrolled the area, as being a senior officer at the Bea Vallon police station, it is quite obvious he would patrol his area. His oral evidence on this issue could be accepted. The accused under oath admits that the

police had come to her place but states she was not at home. For all the aforementioned reasons, I find no merit in any of the grounds of appeal raised by the appellant.

[18] I am satisfied that the Learned Senior Magistrate correctly analysed the evidence of the prosecution witness and I see no reason to interfere with his findings that the evidence of the prosecution witnesses was acceptable. In regard to the findings on facts made by the Learned Magistrate, in the case of **Akbar vs R (SCA 5/1998),** the Seychelles Court of Appeal held that in appeal:

> *"The accepted approach to findings of fact which turn largely on the credibility of witnesses is to uphold such findings if they are supported by the evidence believed by the trial court and if there is nothing perverse in the trial ascribing credibility to such evidence".*

I see nothing perverse in the findings of fact made by the Learned Senior Magistrate and am satisfied that the findings are based on the evidence of the witnesses for the prosecution.

[19] It is also to be borne in mind that the appellant gave evidence and did not deny the fact that she had several dogs but stated that she was running a dog shelter, Pet Haven Society which was a registered association who collect stray dog and was intending to move the dogs out to the Providence Industrial Estate area where she had been given land and funds from the government to run the dog haven. Her evidence and documents D1 and D2 support her defence. However this is not a defence though it may be regarded as a charitable act. Her defence that when other dogs bark, her dogs bark is not a defence as to say the least, the barking of 13 to 20 dogs from with a confined area, is definitely less tolerable in a neighbourhood than the barking of the dogs scattered around the neighbourhood. The fact that her dogs scared away a man jumping over the wall of her neighbour is also not a defence as even if the object of having dogs is to scare away intruders it is immaterial, if the probable result of keeping that many dogs results in causing a nuisance to the public. **Archbold 2008 Edition Criminal Pleading, Evidence and Practice 31-43 also R v Carlile (1834) 6 C&P. 636.** Further it cannot be said that this defence of keeping so many dogs to drive away intruders, facilitates the lawful exercise of the rights by a part of the public as envisaged by the latter part of section 166

of the Penal Code which reads as follows …… *but the fact that it facilitates the lawful exercise of their rights by a part of the public may show that it is not a nuisance to any of the public.* Further the fact that one gentleman in the neighbourhood stated he was not disturbed and a few others did not wish to give statements to the police are not defences in the light of the corroborated and other factual evidence in this case.

[20] For all the aforementioned reasons, I am satisfied that the conviction of the Learned Magistrate cannot be faulted and I proceed to dismiss the appeal against conviction and uphold same.

[21] I will next proceed to deal with the challenge in respect of the sentence imposed by the Learned Senior Magistrate. I will for the purpose of convenience and clarity set out the sentence once again:

> *"In the circumstances, I sentence the convict, Myriam Hoareau to a term of 14 days imprisonment, which is to be suspended for two months in accordance with section 282 of the Criminal Procedure Code. Pursuant to section 282 (3) (a) the suspension of this sentence is made conditional on the convict removing all the dogs from her premises within two months from the date of this sentence save the four dogs which on the day of the locus inquo, the Court was informed by her are her personal dogs . In[f] the convict fails to meet this condition within the two months period, she will be liable to be brought back to Court and be committed to prison for 14 days".*

[22] When one considers the nature of the sentence the first part clearly falls under section 282(1) of the Criminal Procedure Code and in the view of the Court, is not in conformity with the law contained therein as the offence should be suspended for a period of not less than 1 year and not more than 3 years (operational period). Therefore the suspension of the term for a period of 2 months is incorrect and set aside and should be replaced by a period between 1 to 3 years.

[23] The 2nd part of the sentence is based on section 282(3) of the CPC which reads as follows:

(3) *On passing a suspended sentence the court-*

(a) may impose such conditions it thinks fit.

(b) shall explain to the offender in ordinary language his liability under section 283 if during the operational period he commits an offence punishable with imprisonment or breaks any condition imposed under paragraph (a).

[24] It appears based on subsection (a) that the Learned Senior Magistrate has imposed the suspended term on the condition that the appellant remove the dogs other than the four dogs owned by her from the premises. When one considers the nature of the offence for which the appellant was convicted, it was the duty of the Learned Magistrate to take all precautions and ensure that she would not repeat the offence during the operational period of the suspended sentence. Therefore, it is the considered view of this Court that the condition imposed was a fit and proper condition, given to prevent the repetition of the offence and to ensure that the nuisance which affected the community at large was abated. I therefore am of the view that the condition to remove the dogs from the premises was a fit and proper condition, to be imposed in this instant case in order to prevent the appellant re-offending and such condition on which the suspended term was imposed was in conformity with the law and relevant to the charge she had been convicted of.

[25] In regard to the submission that the imposition of a suspended term of imprisonment on the appellant was harsh and excessive the law provides for a term of imprisonment of a maximum period of 1 year on conviction. Therefore the imposition of a suspended term of 14 days imprisonment in my view, cannot be considered to be harsh and excessive. However considering the facts set out in mitigation and led in evidence, the time period given for the removal of the dogs from the premises is insufficient and therefore the sentence is harsh in nature. When one considers the fact that the appellant is running an organisation for the caring of abandoned dogs and puppies and has taken positive steps by obtaining land and funds to shift the pet haven to another location, I am of the view that more time should be given for the appellant to complete the reallocation of the "Pet Haven". Considering the period of time already given by the Learned Senior Magistrate, a further period of 3 months from the date hereof (11th March 2019) is given for the

appellant to remove the dogs from her premises and reallocate them. For the aforementioned reasons, I proceed to reject the grounds of appeal and the submissions of both Learned Counsel in respect of sentence.

[26] For clarification purposes, I set down the sentence as varied by this Court as follows:

The appellant is sentenced to term of 14 days imprisonment which will be suspended for a period of 2 years in terms of Section 282 (1) of the Criminal Procedure Code (CPC) on the following condition.

The appellant is to remove all the dogs from her premises situated at Fisherman's Cove Estate except her personal 4 dogs within a period of 3 months from the date hereof (11th March 2019) failing which, she would be liable to serve the term of 14 days imprisonment for breach of condition imposed (Section 282 (3) (a) read with section 283 (1) of the CPC).

[27] For the benefit of all parties it would be pertinent to refer to section 286 of the CPC which reads as follows:

> *If during the operational period of a suspended sentence, an offender is guilty of the breach of any condition imposed on him by a Court under section 282(3) (a), he shall be liable to be dealt with as if, during such period, he had been convicted of an offence punishable with imprisonment.*

[28] Subject to the variations contained in the sentence herein, the conviction and sentence of the Learned Senior Magistrate is upheld.

Signed, dated and delivered at Ile du Port on 11 March 2019

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Burhan J