

**SUPREME COURT OF SEYCHELLES**

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**Reportable**

[2019] SCSC 304

CN/49/2016

(Appeal from Magistrate's Court  
CR99/2013)

**MICHEL AH-TIME**

*(Represented by Divino Sabino)*

**Appellant**

versus

**THE REPUBLIC**

*(Represented by Ananth Subramanian)*

**Respondent**

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**Neutral Citation:** *Michel Ah-Time (CN 49/2016) (2019) SCSC 304* (28 March 2019)

**Before:** *Dodin J*

**Summary:**

**Heard:** 12 February 2019

**Delivered:** 28 March 2019

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**JUDGMENT**

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**DODIN J.**

[1] The Appellant, Michel Ah-Time was convicted of one count of possession of excess quantity of shells without a permit contrary to regulation 11(7) of the Fisheries Regulations and punishable under Regulation 26 of the Fisheries Regulations made under the Fisheries Act CAP 82 of the laws of Seychelles. The Appellant was sentenced to pay a fine of SCR 10,000 which is the maximum fine under Regulation 26. In addition to the fine, the learned Magistrate ordered that all the shells and the three large cooking pots in which some of the shells were found be forfeited to the Republic.

[2] The Appellant had also been charged with one count of possession of mature coco de mer nuts without approved labels and possession of unworked turtle shells. However although exhibits were produced for these two counts, the accused was acquitted of both counts. The learned Magistrate in sentencing the Appellant also ordered that the exhibits in respect of the two counts for which the Appellant had been acquitted be forfeited to the Republic unless the Appellant except in respect of the coco de mer nuts for which the Appellant was given 4 weeks to show that they were in his lawful possession by producing the necessary approved labels for them.

[3] The Appellant now appeals against both conviction and sentence raising the following grounds of appeal:

Against conviction:

- i. The learned Magistrate failed to take into consideration various facts that would have brought to the amount of marine shells the Appellant was alleged to be in possession of (eg. Corals, gunny bags, permit from the Seychelles Fishing Authority.)
- ii. The Learned Magistrate failed to take into consideration that the Appellant was in lawful possession of at least 594.155 kg of marine shells by virtue of a valid permit from the SFA.
- iii. The Learned Magistrate failed to take into consideration corroborated oral evidence that the Appellant had other permits from the SFA which meant there was reasonable doubt he was in unlawful possession of any of the marine shells allegedly in his possession.
- iv. The Learned Magistrate failed to consider from the facts that there were other persons who were in possession of some of the marine shells that the Appellant was charged to be in possession of.

- v. The Learned Magistrate failed to take into consideration the evidence of the marine shells expert, Dr Rowatt that he did not go through all of the alleged marine shells to confirm that there were indeed 1340.9 kg of marine shells.

Against sentence:

- i. The learned Magistrate erred in giving the maximum sentence, that is, a fine of SCR10,000 given that there were no aggravating factors and given that the Appellant had the belief that he had lawful possession of the marine shells.
- ii. The Learned Magistrate erred in ordering the forfeiture of any item given that the prosecution never moved for forfeiture and the Appellant has therefore never been given an opportunity to be heard with regards to the forfeiture orders.
- iii. The Learned Magistrate erred in ordering for the forfeiture of any coco de mer and its kernels given that there was no conviction on the matter.

[4] The grounds of appeal against conviction are rather nebulous and centred on the learned Magistrate's analysis of the evidence adduced against the Appellant at the trial. The first four grounds of appeal are centred on the aspects of amount, weight and number of permits or possible owners in respect of the shells. As pointed out by the learned Magistrate, this line of defence requires the Court to do some mathematics but the fact remained that the Appellant still did not have the necessary licenses to cover 1340.9 kg of shells. At the most the licenses he had might cover only 594.15 kg for which he provided two documents leaving 756.75 kg outstanding and not covered by any permit. Secondly

how can the Court determine which of the shells were covered by the permit and which were not?

[5] Regulation 7(11) states that

*“No person shall possess more than 20 kilogrammes of shells except pursuant to a permit granted by the SFA”.*

The offence is committed when the person exceeds the allowable 20kg of shells in his possession. It follows therefore that if the person has a license for 594.9 kg, it includes the first 20kg. If the person has more than the licence allow, in this case more than 594.9 kg the person commits an offence not only for the kilograms in excess of the permit but for exceeding the allowable or licensed amount. The law does not require any calculations to be made in that respect and in any event the weight does not have any bearing on the offence except in so far as it exceeds the allowable or permitted amount.

[6] I find that the learned Magistrate took the proper approach in analysing the evidence adduced and the law as it stands. I therefore find no merits in these grounds of appeal and I dismiss all four grounds accordingly.

[7] In respect of the fifth ground of appeal against conviction, I find also that it centres on the evidence of one witness, Dr Rowatt who admitted that he did not go through all of the alleged marine shells to confirm that there were indeed 1340.9 kg of marine shells. Going over the record of evidence, the person who counted and weighed the shells was Andre Freminot. Dr Rowatt testified as to the types of shells as an expert. The fact that he did not weigh each of them is immaterial and certainly not fatal to the charge against the Appellant as the weight had already been established by another witness. I therefore dismiss that ground appeal as well.

[8] Learned Counsel for the Appellant also submitted that the learned Magistrate placed the legal and evidential burden of proving that he had the necessary permits on the Appellant. As a general rule in criminal matters, the burden of proof, both legal and evidential rest on the prosecution. As stated by Zulman JA in S v V 2000 (1) SACR 453 (SCA) at 455a–c:

*"It is trite that there is no obligation upon an accused person, where the State bears the onus 'to convince the court'. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but beyond any reasonable doubt it was false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true, but whether one subjectively believes him is not the test".*

[9] It is true that the choice of wording of the learned Magistrate appears to place the legal and evidential burden of proving that he had the necessary licences on the Appellant. However having gone over the records of trial, I find that the learned Magistrate did not base the conviction of the Appellant solely on the fact that the Appellant failed to discharge the evidential burden of proving that he had a license. The learned Magistrate after having been satisfied that the prosecution had discharged its legal burden of proof only then considered whether there was any onus on the Appellant to at least produce his license if he had one and concluded rightly that in such circumstances and for such type of case, the burden for producing the license rests on the holder of the license who also has peculiar knowledge which marine shells were covered by which license.

[10] I do not consider this approach fatal to the charge for which the Appellant stands convicted. I therefore dismiss the appeal against conviction and uphold the conviction of the Appellant of the offence of possession of excess quantity of shells without a permit contrary to regulation 11(7) of the Fisheries Regulations.

[11] On the appeal against sentence learned counsel submits that learned Magistrate erred in imposing the fine of SCR 10,000 which is the maximum fine allowed by law as there was no aggravating factors and the Appellant believed that he had lawful possession of the shells. Regulation 26 states:

*"A person who contravenes any of these Regulations is guilty of an offence and is liable, where no penalties is provided for the offence, to a fine of R.10,000".*

No penalties are provided for the offences under regulation 7. It is a basic principle that a criminal sentence must be proportionate to the crime for which an accused has been convicted. Generally it is true that unless there is requirement for the imposition of the maximum sentence, a maximum sentence should not be imposed particularly for a first offender. I note nevertheless that SCR 10,000 is not a big amount of money by any means in this day and age where protection of the environment and natural resources are at the forefront. In my view, it is time for the sentences under the Fisheries Regulations to be reviewed.

[12] Nevertheless adhering to the principle of proportionality I recognise that maximum sentences should be reserved for offences where there are more aggravating factors. In the circumstances of this case I find reasonable to reduce the sentence imposed, that is the fine, from SCR10,000 to Rs6,000. I order accordingly.

[13] In respect of the forfeiture orders, in usual circumstances, when a person is acquitted of an offence, items or exhibits which were seized from that person would be returned to that person where lawful ownership is not in contention. However where there is requirement to demonstrate lawful ownership or possession of a thing through valid document, such return may not be as a matter of course but rather upon proof of lawful possession or ownership.

[14] In this case, the law requires documentary proof of ownership of coco de mer nuts and its kernels. I find that the learned Magistrate did in fact give the Appellant 4 weeks to produce his documents of entitlement to the coco de mer nuts. It appears that the Appellant failed to produce the same as the matter is still in contention on appeal. The Appellant was nevertheless given the opportunity to make representations establishing his right to possess the said items. I find that it was not necessary for the learned Magistrate to have done more or to require an application for forfeiture. The same condition is extended to the unworked turtle shells.

[15] In respect of the large pots, I do not find any order in the sentence imposed by the learned Magistrate for the forfeiture of these pots. The law does not require the Appellant to have documentary proof of ownership or possession of those pots. The Appellant was not

convicted of the offence involving the use of the specialised pots. In the circumstances the specialised pots should be returned to the Appellant.

[16] In summary, the appeal against conviction is dismissed in its entirety. The Appeal against sentence is partly allowed as follows: the fine of SCR10,000 is reduced to SCR6,000; In respect of the coco de mer nuts and kernels and the unworked turtle shells, the Appellant must show proof of lawful possession as required by law failing which these items would be forfeited to the Republic. I maintain the period of 4 weeks from the date of this judgment as reasonable period for the Appellant to do that. The specialised pots are returned to the Appellant.

Signed, dated and delivered at Ile du Port on 28 March 2019.

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Dodin J.