

SUPREME COURT OF SEYCHELLES

Reportable

[2020] SCSC **490**
CO 34/2019

In the matter between:

THE REPUBLIC
(rep. by David Esparon)

Republic

and

NELSON FLORE
(rep. by Joel Camille)

Accused

Neutral Citation: *Republic v Flore* CO 34/2019 [2020] SCSC 27 July 2020

Before: Burhan J **490**

Heard: 13 July 2020.

Delivered: 27 July 2020

ORDER

Convict sentenced as follows:

Count 2- a term of 8 years imprisonment

Count 4 -to a term of 14 years imprisonment

Count 5- to a term of 3 years imprisonment

Count 6- to a term of 1 year imprisonment. All terms of imprisonment to run concurrently.

SENTENCE

BURHAN J

[1] The convict Nelson Flore has been convicted of the following offences:

Count 2

Unlawfully wounding with intent to do grievous harm contrary to Section 219 (a) of the Penal Code and punishable under Section 219 of the Penal Code.

Count 4

Assaulting a person with intent to steal money and at or immediately before or immediately after the time of the Assault, wounds any person whilst armed with an offensive weapon contrary to Section 282 of the Penal Code and punishable under the same.

Count 5

Assaulting occasioning actual bodily harm contrary to Section 236 of the Penal Code and punishable under Section 236 of the Penal Code.

Count 6

Possession of ammunition without holding a firearm licence contrary to Section 4 (2) (a) of the Firearm and Ammunition act and punishable under Section 4 (1) of the Firearms and Ammunitions Act.

- [2] Count 2 and 4 attract a maximum term of life imprisonment, while Count 5 attracts a maximum term of seven years imprisonment and Count 6 a maximum term of 1 year imprisonment.
- [3] The background facts of the case are that the convict had entered a shop armed with a gun with the intention of stealing. He had demanded money after showing a hand gun. There had thereafter been an attempt by two persons in the shop to disarm the convict. One person Arun Kumar Ganesan in the shop had got shot by the convict in the stomach and sustained injuries in the stomach. Another Balaji Selvan had received laceration injuries on his head on being hit by the convict with the back of the hand gun. However, the convict had been over powered and handed over to the police and subsequently several charges were brought against him. The convict pleaded guilty to the aforementioned offences and was convicted on his own plea of guilt.

[4] At the request of learned Counsel for the convict Mr. Joel Camille a probation report was called. According to the report the convict is 28 years old. He is not involved in any relationship and has no children. He has been employed as a cemetery attendant and at the time of arrest was working on a casual basis with a landscaping contractor. The probation report indicates that the convict had attempted this crime due to his craving for Heroin, as he was an addict at the time and had no funds to buy Heroin to satisfy his addiction. It appears from the report that the convict explains to the probation officer that he had fired the first shot, to show the persons in the shop the gun was a real gun. The report also states that according to the convict, the gun had discharged during the struggle between himself and the two victims and was not intentional. Another victim had got injured attempting to stop the convict from breaking way from the individuals who were restraining him. The convict has expressed regret at the commission of the offence to the probation officer and blames his Heroin addiction in that it prevented him from thinking rationally. The convict according to the report is not in favour of curing his addiction by way of taking methadone but however his stay in remand has kept him away from Heroin. His mother too blames the Heroin addiction for his conduct according to the report but she too admits that reasoning with him to quit the addiction was not successful. It appears he is not making any effort on his part to rid himself of the Heroin addiction. It is only the incarceration in remand that is preventing him from this dangerous addiction.

[5] Learned Counsel for the convict Mr. Joelle Camille made a strong plea in mitigation on behalf of the convict. He moved Court that even though there are two offences, Counts two and four, the maximum term of imprisonment a person was liable to was life, in accordance with section 27 of the Penal Code, courts were empowered to give any shorter term of imprisonment. Having considered section 27 of the Penal Code, I am inclined to accept the views of learned Counsel Mr. Camille on this issue. Learned Counsel further moved court to consider the facts contained in the Probation Services Report in regards to the personal circumstances of his client which support the fact that at the time the convict committed the offence, he was a drug dependent person.

[6] Learned Counsel further stated that the convict was very remorseful at what he had done and moved court to act under section 36 (4) of the Misuse of Drugs Act 2016 (MODA),

read with section 39 (3) which referred to persons not being sent to jail for offences under the MODA and any other written law, if the crime was committed as a result drug addiction. He relied on section 39(3) which states, "*notwithstanding anything in this Act or any other written law, a drug dependent person shall not be sentenced to imprisonment unless the Court considers that there is no reasonable alternative available in the circumstances*". He moved that the convict not be sent to prison as even though he had committed a serious offence since he was a drug dependent person. Learned Counsel for the convict further stated that the convict had pleaded guilty without proceeding to trial thereby saving the time of court and expressing remorse at what he had done and taken responsibility for his actions.

- [7] Learned Counsel for the convict further submitted that the convict came from a dysfunctional family as the father had left the mother and this had affected the convict who was not stable in school and who stopped his schooling career early. The result, is that the convict had drifted into drugs. This fact is also supported by the probation report. He further submitted that the gun had gone off during a struggle and that the convict too had got beaten during the incident, at the hands of the workers in the shop. He further submitted that as the convict had been in remand since his arrest this would suffice as a term of incarceration. Learned Counsel in mitigation further submitted that the injuries suffered by the victims were not life threatening and even though one person had gone to hospital it was not for a long time.
- [8] I have considered the facts set out in the probation report and the strong plea in mitigation made by learned Counsel for the convict. I would first consider the background facts of this case. The facts indicate that the convict took a hand gun (offensive weapon) with him and went to the shop with the clear intention of using it to scare people and steal money to buy Heroin to feed his addiction. Therefore, he was well aware of the consequences of his act in using a gun during a robbery and at the time of entering the shop he was ready to use the gun and did use the gun, resulting in damage to the shop and serious injury to an individual. It cannot therefore be said he did not know the seriousness of his acts or the dangers of using a hand gun. Using a gun during a robbery is a very rare occurrence in the

Seychelles and therefore in the view of the court, strong deterrent punishment should be given to ensure that such actions are not repeated.

[9] A further aggravating fact is that a gun was used and injured two individuals who attempted to stop the robbery. One individual received a serious gunshot injury and had to be admitted to hospital and warded for treatment according to the affidavit filed by Sub Inspector Shepherd Leon dated 24th July 2019. The convict cannot hide behind the fact that he had shot him during an ensuring struggle, as he should have been aware of the fact that during such an act of stealing, there could be opposition. This does not give him the right to use a gun or any weapon to counteract such opposition. His excuse that during the struggle the gun went off is therefore not a mitigating factor, as this was a probable consequence he should have been aware of, at the time he armed himself before committing the felony. Such excuse or reason therefore cannot be accepted as a mitigating factor.

[10] *In Rath v Republic [2016] SCCA 36*, it was held that in deciding the appropriate sentence, it is trite law in many jurisdictions that the court should be guided by a number of principles, i.e. –

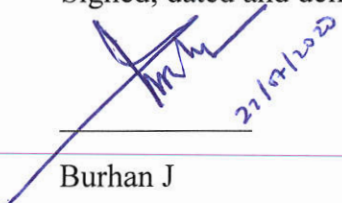
- (i) The public interest.
- (ii) The nature of the offence and the circumstances under which it was committed.
- (iii) For a first offender the emphasis should be on reformative aspect.
- (iv) The gravity of the offence.
- (v) The prevalence of the offence.
- (vi) The damage caused i.e. seriousness of injury caused in an assault, rape, in a case of drugs its impact on society, etc.
- (vii) The mitigating factors.
- (viii) The age and previous record of the accused.
- (ix) The period spent in remand custody.

- (x) The accused's cooperation with law enforcement agencies.
- [11] Having thus listed out the factors to be considered as mentioned earlier, using a gun during a robbery is a very rare occurrence in the Seychelles and therefore in the view of the court, strong deterrent punishment should be given to ensure that such actions are not repeated. This makes the nature of the offence aggravated. Further during the robbery two persons were injured one had grievous gunshot injuries and had to undergo hospitalisation. Considering the gravity of the offence committed by the convict, I am inclined to disregard the provisions of section 39 (3) of MODA 2016 and impose a term of imprisonment.
- [12] When one considers the case of *Hedley Moustache v Republic [2016] SCCA 11*, the Seychelles Court of Appeal upheld a sentence of 15 years imprisonment in a case of robbery with violence where the convict used a knife. The injuries in the *Hedley Moustache* case were not of a serious nature. In this case, the convict Nelson Flore has used a pistol and injured two persons one grievously unlike the Moustache case. However the convict in this case unlike the *Hedley Moustache* case, is a first offender and has expressed remorse and regret by pleading guilty.
- [13] Having considered the facts peculiar to this case, the mitigation plea of Learned Counsel and the aggravated facts as set out above, I proceed to sentence the convict Nelson Flore as follows:
- Count 2- a term of 8 years imprisonment.
- Count 4 -to a term of 14 years imprisonment.
- Count 5- to a term of 3 years imprisonment.
- Count 6- to a term of 1 year imprisonment.
- [14] As all offences were committed in the course of the same transaction, all sentences to run concurrently.

[15] Considering the length of time the convict would be in prison and the fact that the victim who suffered grievous injury is no more in the Seychelles as borne out by the probation report, I make no order in respect of compensation.

[16] I make further order that the time spent in remand to count towards sentence.

Signed, dated and delivered at Ile du Port on 27 July 2020.



Burhan J