IN THE SUPREME COURT OF SEYCHELLES

THE REPUBLIC
V
MIKE LESPERANCE

Revision Side No. 2 of 2008

Mrs Cesar for the Republic

JUDGMENT

Burhan J

This is a revision application filed by the Attorney General in terms of section 328 of the Criminal Procedure Code Cap 54, in respect of the sentence passed by the learned magistrate on the respondent (accused) Mike Lesperance .

Section 328 of the Criminal Procedure Code reads as follows:

"The Supreme Court may call for and examine the record of any criminal proceedings before the Magistrate's court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the Magistrates' Court."

The background facts of this case are that the respondent while being unrepresented in the Magistrates court pleaded guilty on the 4th of September 2008 to the charges of,

1) Entering a dwelling house at night with intent to commit a felony therein contrary to and punishable under section 290 of the Penal Code.
2) Attempted robbery contrary to section 378 as read with section 280 and 281 of the Penal Code.

The learned Magistrate proceeded to convict him on his plea in respect of both counts and sentenced him as follows;

Count one- a term of 1 year imprisonment.
Count two- a term of 2 years imprisonment.

It was further ordered that both terms run concurrently.

The Attorney General seeks to move in revision against the sentence imposed on the respondent, on the grounds that the minimum mandatory term of 5 years imprisonment prescribed by law, had not been imposed by the learned magistrate in respect of count one and two and therefore the sentence imposed by the learned magistrate is wrong in law and should therefore be revised.

It is to be noted that the accused well knowing this case was pending, has served the term imposed by the learned magistrate and thereafter left the jurisdiction of Seychelles. When one peruses the proceedings filed in this case, on the 26th of May 2009 in the presence of the accused and his counsel the case was fixed for hearing. Similarly on the 21st of September 2009 the case was re fixed for hearing in the presence of the accused and his counsel. Thereafter on the 5th of April 2010 learned counsel for the accused informed court her client had left the country (a fact confirmed by the

prosecution) and that she had not received any instructions as she did not have a client anymore. It is clear from the above that the accused was well aware that the hearing of this case was pending before this court but had deliberately left the country without giving proper instructions to counsel to appear on his behalf.

Section 330 of the Criminal Procedure Code states that no party has any right to be heard either personally or by advocate before the Supreme Court when exercising its powers of revision. The proviso of this section permits court to, if it thinks fit, use its discretion and hear any party either personally or by advocate. Section 328 (2) sets out, that no order in revision shall be made to the prejudice of an accused person, unless he has had an opportunity of being heard either personally or by an advocate to his own defence. In this instant case as shown above, several opportunities have been given to the accused of being heard but he has on his own volition decided for reasons best known to him, not to avail himself of the opportunities but to leave the jurisdiction of Seychelles, knowing very well this case was pending before this court. This court is satisfied from the contents of the record itself, that the accused was fully aware this case was pending and was to be heard but had without giving instructions even to his counsel left the country. On the facts before court, this court is satisfied that in terms of section 328 (2) of the Criminal Procedure Code the necessary *"opportunity of being heard"* (emphasis added) was provided to the accused by court which he on his own accord has decided to quite obviously forfeit.

Learned counsel for the Attorney General seeks to rely on section 27 A (1), (c) and (i) of the Penal Code as amended by Act No 16 of 1995 which state that:

27 A (1)"Notwithstanding section 27 and any other written law, a person who is convicted of an offence in Chapter XXVIII or Chapter XXIX shall-

(c) Where the offence is punishable with imprisonment for more than 10 years or with imprisonment for life-

(i)And it is the first conviction of the person for such an offence or a similar offence, be sentenced to imprisonment for a period of not less than five years."

The Penal Code as amended by Act No 16 of 1995 provides that a person convicted of an offence under section 290 found in Chapter XXIX is liable to imprisonment for 14 years.

It follows that, as the offence falls within Chapter XXIX of the Penal Code and the offence is punishable with imprisonment *for more than 10 years* (emphasis added) the minimum mandatory term of 5 years imprisonment, should have been imposed on the respondent in this case. However a term of 1 year imprisonment only has been incorrectly imposed by the learned magistrate.

It is apparent that the sentence imposed by the learned Magistrate of 1 year imprisonment on the respondent in respect of count 1, is incorrect and herewith set aside and the minimum mandatory term prescribed by law which is a term of 5 years imprisonment is hereby substituted.

Similarly as count 2 falls within Chapter XXVIII of the Penal Code and is punishable by imprisonment of up to 14 years the magistrate was bound to sentence the respondent to the minimum mandatory term of 5 years

imprisonment on this count. However the learned magistrate has sentenced the accused to only two years imprisonment.

It is to be noted that in terms of section 282 of the Penal Code, attempted robbery is specifically stated to be a felony as such it cannot be considered to be a misdemeanour in terms of section 378 of the Penal Code.

Therefore the sentence imposed by the learned magistrate of 2 years imprisonment on the respondent in respect of count 2 is incorrect and herewith set aside and the minimum mandatory term prescribed by law which is a term of 5 years imprisonment is hereby substituted.

It is further ordered that both terms of imprisonment imposed in respect of counts one and two run concurrently.

The sentence imposed by the learned magistrate in respect of counts one and two stands revised accordingly.

M. BURHAN

JUDGE

Dated this 30th day ofJuly 2010