IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 56/2012

Appeal from Magistrates Court decision 447/2011

[2014] SCSC 268

MERVIN ESPARON
Appellant

Versus

THE REPUBLIC

Heard:	26 June 2014
Counsel:	Mr Nichol Gabriel for appellant
	Mrs Lansinglu Rongmei, Assistant State Counsel for the Republic
Delivered:	28 July 2014

JUDGMENT

McKee J

[1] The Appellant was charged with the following offence in the Magistrates Court of Seychelles:

[2] Breaking and Entering into a building and Committing a felony therein contrary to section 291[a] of the Penal Code.

[3] The Particulars of the offence were as follows:

[4] Mervin Esparon, residing at Baie Lazare, Mahe, during the night of 10th July 2011 at Mr Keneth La-Wah's shop, Baie Lazare, Mahe, broke and entered the said shop with intent to commit a felony therein, namely stealing.

[5] During the preliminary procedure on 25th July 2011 and before plea was taken the charging section was amended to section 292 of the penal code. The working in the statement of offence was also amended to reflect this change: the words "breaking and entering into a building with intent to commit a felony therein "were substituted for the words "breaking and entering a building *and committing a felony therein (my italics*).

[6] On 5th October 2011 the Record shows that *the charge (again my italics)* was put to the Appellant and he pleaded Not Guilty. On 27th November 2012 the matter proceeded to trial where the Appellant was represented by Mr France Bonte.

[7] After trial the Appellant was found guilty, convicted of the charge and sentenced to ten years imprisonment. The Appellant lodged an appeal against sentence only. Mr Nichol Gabriel represents the Appellant in the appeal and duly submitted his Memorandum of Appeal relating to Sentence only. Thereafter he submitted his written Submissions setting out in more detail the grounds of appeal.

[8] Mr Gabriel later applied to me for consent to extend his Appeal to include an appeal against conviction. I considered it was just and equitable to grant consent despite the fact the application was very late and out of time. Mr Gabriel submitted amended submissions to incorporate his grounds of appeal against conviction and sentence. In answer Mrs Lansinglu submitted her written Reply. Thereafter Defence Counsel lodged further submissions on Conviction and Sentence dated 4th July 2012.

[9] I considered this appeal against conviction and sentence. I had the typewritten and handwritten notes of proceedings, the findings by the magistrate, his reasons for sentence and the written Submissions of Counsel.

[10] **APPEAL against CONVICTION.**

[11] Mr Gabriel refers firstly to the fact that prior to trial the charge was amended. He submits that the Appellant was not asked to plead afresh to the amended charge. I have the Notes of Proceedings. The Appellant was first brought before the court on 11th July 2011. Preliminary matters were dealt with. On 25th July 2011 the prosecutor made application to amend the original charge so that the wording would read " Breaking and entering into Building *with intent to commit* a felony therein" was substituted for "Breaking and entering and *committing* a felony therein" and the charging section was amended from section 291[a] to section 292 of the Penal Code. The application and amendment was granted by the Magistrate. No plea had been taken by this stage. There were other appearances and the record of proceedings shows that the charge was only formally read to the Appellant on the later date of 5th October 2011 to which he entered a plea of not guilty.. The Appellant had the assistance of counsel Mr. Bonte when plea was taken and also a trial.

[12] On this preliminary point it would seem that the court prosecutor had noticed the inconsistency between the original statement of offence and the wording of the particulars of offence and hence amended the charging section to section 291[a]to section 292 of the penal code. Section 292 is the lesser offence so, in seeking the amendment, the prosecutor was acting fairly and equitably and not contrary to the interests of the Appellant.

[13] Defence Counsel submits that the Magistrate erred in failing to invite the Appellant to plead afresh to the amended charge. With all due respect that is not the position. The charge was amended PRIOR to any plea being taken. The Appellant had not been asked to plead to the original charge. Despite defence submissions there is no evidence before this court to suggest that the Appellant was asked in error to plead to the original charge rather than the amended charge or that the trial was on the basis of the original charge. For this to have occurred such error would have had to escape the notice of the Magistrate, the Prosecutor and the Defence Counsel. Furthermore the Warrant of Commitment states that the Appellant was convicted of the offence of Breaking and

Entering into a building with intent to commit a felony therein contrary to section 292 of the Penal Code. The typewritten Notice of Appeal signed by the Appellant from prison contains the wording "*with intent to commit a felony therein"* and refers to section 292 of the penal code. Furthermore this point was never raised by way of a no case to answer submission or in a final closing statement. While it is not specifically recorded in the Notes of Proceedings that the trial was in connection with the amended charge. I find that this in fact was the case.

[14] Defence Counsel also submits that the Appellant was only warned of the potential prison sentence under section 291[a] of the Penal Code. This is correct and was done prior to the amendment of the charge and when the Appellant was not represented. However on the date for trial the Appellant was represented and Defence Counsel was present to fully advise him on court procedures and any possible sentence.

[15] The Magistrate heard all the evidence from the prosecution witnesses. He had also the unchallenged caution statement of the Appellant which was admitted into evidence without objection. In this statement the Appellant admitted breaking and entering into the shop to steal. The Appellant elected to remain silent and did not call witnesses. The Magistrate correctly stated that no adverse inference could be drawn from his election to remain silent nor his decision not to call witnesses. The Magistrate found that there was overwhelming evidence against the Appellant. By so stating I find that the Magistrate had decided that the prosecution had proved the guilt of the Appellant to the required standard and had proved each and every ingredient of the offence under Section 292 of the Penal Code beyond reasonable doubt. Consequently the Appellant was convicted of the charge. I find that the Magistrate did comply with section 143 of the Penal Code.

[16] I have also read the record of the proceedings. There is ample evidence before the court for the Magistrate to find the Appellant guilty and convict him of the amended charge. I find that there was no irregularity in the proceedings.

[17] There are no grounds to interfere with the original findings and I DISMISS the appeal against Conviction.

[18] **APPEAL against SENTENCE.**

[19] The Appellant stood convicted of an offence contrary to section 292 of the Penal Code. Up to the time of conviction the Appellant had been a man of clear record. He was convicted after trial. The maximum sentence which a court can impose for a conviction under section 292 of the Penal Code is five years imprisonment. This point is conceded by Counsel for The Republic.

[20] In my opinion it would be unusual to impose the maximum sentence on a first offender even after trial. Apart from the act of breaking and entering there were no other aggravating factors. The premises were business rather than domestic premises. The Appellant was found on the premises by the Police. I find that he did not have the opportunity to take away or dispose of any items from the premises. There is no evidence that the Appellant violently resisted arrest. I allow the appeal against sentence and quash the sentence of ten years imprisonment and in it place impose a sentence of three years six months imprisonment.

Signed, dated and delivered at Ile du Port on 28 July 2014

C McKee
Judge of the Supreme Court