IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 79/20

Appeal from Magistrates Court decision 835/2011

[2014] SCSC

RYAN GERRY
Appellant

versus

THE REPUBLIC

Heard:	30th July 2014
Counsel:	Mr. Basil Hoareau Attorney at Law for appellant
	Mr. Ananth, Assistant Principal State Counsel for the Republic
Delivered:	15 October 2014

RULING

Burhan J

[1] Learned counsel for the Appellant moved court in terms of section 319 (1) of the Criminal Procedure Code that this court either take additional evidence in this case or directs that additional evidence be taken by the Magistrates' Court.

[2] Section 319 (1) of the Criminal Procedure Code reads as follows-

"In dealing with an appeal from the Magistrates' Court the Supreme Court, if it thinks additional evidence is necessary, shall record its reasons and may either take such evidence itself or direct it to be taken by the Magistrates' Court."

[3] It is the contention of learned counsel for the Appellant that the charge is fundamentally flawed as it does not disclose a person in that the person disclosed Banyan Tree Hotel is not a Company but a business name belonging to a Company.

[4] The Appellant was charged in the Magistrates' Court as follows-

Count 1

Breaking and Entering into Building Committing a Felony therein contrary to Section 291 (a) read with Section 23 of the Penal Code.

The particulars of the offence are that Ryan Gerry and Valentina Dodin, both residing at Takamaka, Mahe, during the early hours of the 9th of December 2011, at the Banyan Tree Hotel, Takamaka, Mahe, broke and entered beach villa number 124 and stole therein, one LCD Television make Sony to the value of $1400, one DVD player make Phillips to the value of $250, one MP3 player & two speakers to the value $350, one water kettle to the value of $39, various bottles of wines, liquors, spirits and foodstuffs to the total value of $174, all amounting to the value of $2213/-, being the properties of the Banyan Tree Hotel.

[5] The Appellant was found guilty after trial and convicted and sentenced to a term of 7 years imprisonment. The Appellant has appealed against the conviction and sentence.

[6] It is apparent that when one peruses the proceedings of the trial court, the Appellant was represented by another Attorney at Law throughout the trial. It appears at no stage was this objection pursued in the trial court. Considering the fact that the prosecution has not sought to make any last minute amendments to the said charge and the fact that the Appellant was represented by a learned counsel, this court is satisfied that had due diligence been exercised the "new evidence" could have been led at the trial court. It is the view of this court that one must not seek to cure ones lapses in the trial court by way of introducing new evidence in the appeal. I hold therefore that learned counsel for the

Appellant has not been able to satisfy this court that the new evidence he wishes to lead could not have been obtained at the trial with the exercise of due diligence.

[7] On perusal of the evidence in this case it is apparent the stolen items did not belong to the Appellant. It is clear from the evidence that the Appellant was aware that it did not belong to him but to someone other than himself. To allow the application at this stage would be unfair as the prosecution has not been given a chance to meet the challenge at the trial stage as the challenge was not forthcoming eventhough the defence was well aware of the charge from the very outset of the trial. This section as stated earlier cannot be made use of to cure the lapses on the part of the prosecution or defence but is available in instances where the new evidence could not have been obtained with the exercise of due diligence and therefore this opportunity is given to the Appellant in the interests of justice in order that court could come to a proper finding. The discretion to call for new evidence at this stage should be exercised sparingly and only in exceptional circumstances.

[8] ***Archbold Pleading, Evidence and Practice 2010*** at 21-66 states;

"there may be a conviction of theft of property belonging to a person unknown, provided it can be proved that the property must have belonged to someone and that the defendant knew it belonged to someone other than himself."

[9] Considering the similarity of the nature of the charge in this instant case which also refers to the stealing of certain items, it is the view of this court that if the 'new evidence' learned counsel wishes to lead, was to establish the fact that the property stolen in actual fact belonged to the Appellant himself which the Appellant was not aware at the time of trial, then in the interests of justice the application would have been allowed. In this instant case however the 'new evidence' learned counsel seeks to lead in the view of this court is based on a technicality which is curable and will not therefore affect the final outcome of this case.

[10] I therefore proceed to decline the application to call new evidence.

Signed, dated and delivered at Ile du Port on 15 October 2014

M Burhan
Judge of the Supreme Court