IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 23/2014

Appeal from Magistrates Court decision 275/2013

[2014] SCSC

DAVID ANDY JEAN BAPTISTE
Appellant

Versus

THE REPUBLIC

Heard:	8 August 2014
Counsel:	Mr. Clifford Andre for appellant
	Ms. Brigitte Confait, Attorney General for the Republic
Delivered:	13 August 2014

JUDGMENT

D. Akiiki-Kiiza J

[1] The appellant is appealing against a sentence of 8 years imprisonment imposed on him by his Worship K. Labonte, a Magistrate at the Magistrate court in Mahe.

[2] The appellant had pleaded guilty to the charge of *House Breaking C/S 289 (a) of the Penal Code Act and punishable under the same section*. This was in the first count. He was also charged of *Stealing from a Dwelling House C/S 264 of the Penal Code Act and also punishable under the same section.*

[3] However when the appellant pleaded guilty to the first count the prosecution purported to withdraw the second count under *Section 145 of the Criminal Procedure Code*.

[4] As this court had pointed out in the case of ***MARCEL DAMIEN QUATRE [2014] SCSC NO 10/14*** a withdraw under the provision of *Section 145 of the Criminal Procedure Code* must come **AFTER the accused had been convicted** but not when the accused has just pleaded guilty. It is common knowledge that a conviction comes only after the facts have been read out to the accused and he has accepted them as true and correct. It is only after the acceptance of the facts that the court convicts an accused person. Thereafter the provision of *Section 145 of the Criminal Procedure Code* comes operational and the prosecution could withdraw any other counts it deems appropriate with the consent of the court. For clarity, I will set out the *Section 145 of Criminal Procedure Code*:

> *"145. Where there are more charges than one against the same accused and he **HAS BEEN CONVICTED** of one or more of these the person conducting the prosecution may with consent of the court withdraw the charges'* (emphasis mine)

The Lower Court Record appears to show that it was the counsel for the accused who purported also to accept the facts as correct on behalf of the appellant himself. This is erroneous and could amount to a plea being declared equivocal. (See the case of ***LENNY TERRANCE HENRY VS REPUBLIC [2014] SCSC CA NO 54/2012*** and the Court of Appeal case of ***RAYMOND TARNECKI VS REPUBLIC SCA CA NO 4/96***). I was surprised that the learned counsel for the appellant never raised this point.

[5] Be it as it may, the Magistrate sentenced the appellant to 8 years imprisonment. The appellant was not satisfied with the sentence and has now appealed to this court on the following ground:-

i. That the sentence passed by the learned Magistrate was wrong in principle.

ii. That the sentence of 8 years passed by the Magistrate was excessive and harsh in the circumstances.

iii. That the Magistrate should have considered that the appellant had pleaded guilty and applied the principle in ***PONOO VS ATORNEY GENERAL SCA 48/10*.** Which would have resulted the Magistrate to pass a much lesser sentence than he did.

iv. That the Magistrate was wrong in not giving more lenience to the fact that the appellant was a young man and was a first offender over and above the fact that he had plead guilty.

He therefore prayed for the setting aside or reducing of the sentence of 8 years imprisonment.

[6] At the hearing Ms. Brigitte Confait appeared for the Republic/ Respondent and Mr. Clifford Andre appeared for the appellant. During oral submissions, Mr. Andre argued grounds 1 and 4 together, to the effect that the learned trial Magistrate never took into consideration all the mitigating factors in favour of the appellant hence reaching a wrong sentence, that apart from pleading guilty, the accused was a first offender and all items stolen had been returned to the complainant and lastly that the appellant was remorseful; which are exception to the mandatory minimum sentence as per the Court of Appeal decision ***PONOO VS ATTORNEY GENERAL, S.C.A 48/10***. Hence he prayed for the court to reduce the sentence accordingly.

[7] On the other hand Ms. Confait, was of a view that the learned trial Magistrate was within his powers when he imposed a sentence of 8 years on the appellant; which was in accordance with Act 5/12. That in the maximum sentence under *section 289 (a) of the Penal Code Act* is 10 years imprisonment. Therefore the sentence of 8 years imprisonment was appropriate in the circumstances. She cited the Court of Appeal case of ***DINGWALL VS REPUBLIC [1966] SLR 205 AND MARIE CELINE QUATRE VS REPUBLIC [2006] SCA 2/06*** in support thereof.

[8] The former case laid down the circumstances under which an appellant court can interfere with a sentence imposed by a trial court, that is to say, where the trial court acted on wrong principle; where it overlooked some material factors, or took into consideration factors which are irrelevant; and where the sentence is manifestly harsh and and/or excessive in the circumstances.

[9] In ***MARIE CELINE QUATRE*** case, their Lordships defined what amounted to a WRONG PRINCIPLE as follows:-

i. Where a sentence is not provided under the law or
ii. Is *ultra vires*, or
iii. Is in direct conflict with the law.

Ms. Confait was of a view that none of the above happened in the instance case. She therefore prayed that this court does not interfere with the sentence imposed by the learned trial court.

[10] In ***PONOO VS ATTORNEY GENERAL [2011] SLR 424 the SCA*** had an occasion to review and to pronounce itself on the law regarding minimum mandatory sentences. Their Lordships held that there are three tests which the minimum mandatory sentence must pass before the court can depart from the minimum mandatory sentence imposed by the law.

i. *The legal test of constitutionality.* ***Article 16*** *of the Constitution relating to torture, cruel, inhuman or degrading treatment or punishment. (*Their Lordships gave an example of imposing corporal punishment if law makes it mandatory.)

ii. *The second test is against* ***Article 119 (2)*** *of the Constitution relating to the independence of the judiciary i.e. the law removing the discretion of the court to individualise the sentence to fit the circumstances.*

iii. *The third test is against* ***19 (1)*** *of the Constitution relating to the rights of an individual to a fair hearing by an independent and*

impartial court and the right to be sentenced according to the circumstances surrounding the individual case and right to mitigate against the mandatory minimum sentence along with the principle of proportionality and individualization of his sentence.

[11] In the instant case, after the learned trial Magistrate had entered a conviction. Mrs. Amesbury who appeared for the appellant stated as follows:-

Mrs. Amesbury: ***"The convict is a first offender. The stolen item returned to owner, Remorseful, Corporate with the court, Pray for the court to impose minimum sentence"***

Magistrate: ***"Sentence: - I have considered the guilty plea of the accused and mitigation of his counsel and sentence the accused to the minimum sentence of 8 years imprisonment. I order that the sentence to take effect on the day he was convicted on the 18/2/14. I further order that cash bail of RS5000.00/- as per receipts 604323 dated 1/2/13 be paid to accused forthwith. Accused has a right to appeal to the Supreme Court within 14days."***

Signed K. Labonte (Mr)

Magistrate, 19/02/14.

[12] In my view the learned trial Magistrate took into account the mitigation as pointed by the appellants counsel, and he actually stated so in his ruling. To this extent, I see no merit in the 1st and 4th ground of appealed. The law allowed the Magistrate to impose 8 years imprisonment and *prima facie* he acted within his powers. Perhaps the only point to note is that the existing law (Case Law) as per ***PONOO VS ATTORNEY GENERAL*** appeared not to have been taken into account by the learned trial Magistrate, as he appeared feel that he was bound by the minimum mandatory sentence under *Act 5/12. Section 26 (2) (b) (1) of the Penal Code Act (Amendment) Act 2012*, enacts as follows:-

" 27 (1) Notwithstanding Section 26 and any other written law and subject to subsection (2) a person who is convicted of an offence in Chapters XXVI, XXVIII and XXIX.

(a) ....

(b) Where the offence is punishable with imprisonment for more than 8 years but not more that 10 years (as in this case) and

i. It is the first conviction of the person for such an offence,(as in this case) be sentenced to imprisonment for a period of not less than 8 years imprisonment"

Let us apply the 3 tests under ***PONOO CASE*** to the instant case:-

(i) The legal test under Article 16 of the Constitution i.e. whether the minimum mandatory sentence degrades, is inhuman, or cruel to the appellant. In my view the sentence of 8 years imprisonment does not infringe Article 16 of the Constitution and it was neither cruel nor degrading to the accused person.

(ii) The second test is under Article 119 (2) of the constitution relating to the independence of the Judiciary. It appears the Magistrate acted as if he was bound by the law to impose the minimum sentence as provided by Act 5/2012 that he say he felt he had no discretion to impose a lesser sentence.

(iii) It also appears under the third test Article 19 (1) of the constitution which ensures a fair hearing by an independent an impartial court which includes taking into account the mitigating factors as an individual offender, along with the principle of proportionality of the sentence. It appears from the facts; the sentence of 8 years fails this 3rd test.

[13] All in all I find that, had the learned Magistrate felt not bound by the mandatory minimum sentence of 8 years imposed, and given the mitigating factors put forward by the appellant's counsel he would have used his discretion to impose a lesser sentence than the 8 years imprisonment. All in all the 2nd and the 3rd grounds of appeals succeed.

[14] In the premises therefore I allow this appeal in the following terms:-

The sentence of 8 years imprisonment is set aside and substituted with a sentence of 5 (five) year's imprisonment. The sentence is to run in the terms proposed by the learned trial Magistrate. Order accordingly.

Signed, dated and delivered at Ile du Port on 13 August 2014

D. Akiiki-Kiiza
Judge of the Supreme Court