IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 52/2013

Appeal from Magistrates Court decision 768/2009

[2014] SCSC

PIERRE BENOIT
Appellant

versus

THE REPUBLIC

Heard:	17th July 2014, 26th August 2014
Counsel:	Mrs. Alexia Amesbury Attorney at Law for Appellant
	Ms. Emily Gonthier, Assistant State Counsel for the Republic
Delivered:	7th November 2014

JUDGMENT

Burhan J

[1] This is an appeal against sentence.

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

Count 1

Breaking and entering into building with intent to commit a felony therein contrary to and punishable under Section 292 of the Penal Code

The particulars of offence are that Pierre Benoit residing at Sans Soucis, Mahe, in the early hours of the morning of the 30th day of November 2009, at Francis Rachel Street, Victoria, Mahe, broke and entered into the Tim-Samy's shop with intent to commit a felony therein.

[3] The Appellant was found guilty after trial and on conviction was sentenced to a term of 5 years imprisonment.

[4] Learned counsel for the Appellant has appealed from the sentence on the following grounds-

a) *The sentence is harsh and excessive as it is not proportional to the offence as contained in the particulars of offence and the learned Magistrate had failed to consider the personal circumstances of the Appellant at the time of sentencing.*

b) *The Appellant was a first offender and there was no evidence of him having stolen anything.*

c) *The judicial test of constitutionality and the test of constitutionality of defence rights as set out in the case of* ***Ponoo vs Attorney General SCA 38/10*** *had not been considered at the time of sentencing.*

[5] It is apparent on perusing the reasons contained in the sentence imposed on the Appellant, the learned Magistrate had erred in assuming that the offence was under section 291 (a) of the Penal Code. The learned Magistrate had further erred in taking into consideration the law applicable as that prescribed in section 27 A (1) (c) (i) of the Penal Code as amended by Act 5 of 2012. Firstly the offence as set out in the statement of offence is under section 292 of the Penal Code. The offence was committed on the 30th of November 2009 and therefore Act 5 of 2012 is not applicable as it was not the law in force at the time the offence was committed. The relevant laws applicable to sentencing would be section 292 of the Penal Code as amended by Act 16 of 1995 which came into force on the 6th of November 1995 the date of publication.

[6] The learned Magistrate had erred in law in applying Act 5 of 2012 and coming to a finding that *"At the time the offence was committed the minimum was 10 years for a first*

time offender and 15 years for a repeat offender." For the aforementioned reasons I hold that the sentence imposed by the learned Magistrate is based on incorrect findings and proceed to set aside same.

[7] According to the applicable law the Appellant was liable to a term of 7 years imprisonment. Section 27 A (1) as amended by Act 16 of 1995 reads as follows-

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

Where the offence is punishable with imprisonment for seven years or more but not more than eight years and the person had, within five years prior to the date of the conviction, been convicted of the same or similar offence, be sentenced to imprisonment for a period of not less than three years."

[8] Therefore it is apparent that a minimum mandatory term of imprisonment is only applicable if the convict has been convicted of the same or similar offence within a period of five years prior to the date of conviction. The learned prosecutor at the time of sentencing had informed the learned Magistrate that the Appellant was a first offender. Therefore a minimum mandatory term of imprisonment was not applicable to him.

[9] It is to be observed that learned counsel for the Respondent in this appeal has belatedly in her written submissions, without seeking permission of court or the consent of learned counsel for the Appellant filed in this court, a previous conviction record of the Appellant showing he had previous convictions at the time of sentencing which is contrary to what the learned prosecutor had informed the learned Magistrate at the time of sentencing as he had stated the Appellant was a first offender. Considering the fact that the proper procedure has not been followed nor the consent of this court obtained prior to filing same, the previous conviction record of the Appellant filed in this court is rejected.

[10] It is borne out by the proceedings in the trial court that learned counsel for the Appellant at the time of sentencing had brought to the notice of the learned Magistrate that the Appellant was already serving a term of two years imprisonment. This fact is admitted even by the learned counsel who appears for the Appellant in this appeal who states in

her submissions that the sentence should have been reduced taking into consideration the fact the Appellant was already serving a term.

[11] On considering all the facts as they were before the learned Magistrate at the time of sentencing, as the offence was committed under section 292 of the Penal Code as amended by Act 16 of 1995 and not under section 291 (a) of the Penal Code as amended by Act 5 of 2012 and for the reasons contained herein, I will proceed to set aside the sentence of 5 years imposed by the learned Magistrate and substitute in its place a sentence of three years which would run consecutively to the sentence he was serving at that time. Time spent in remand to count towards sentence.

Signed, dated and delivered at Ile du Port on 7 November 2014

M Burhan
Judge of the Supreme Court