RAMSURRUN M. E. v THE STATE

2023 SCJ 198
Record No. 9515

THE SUPREME COURT OF MAURITIUS

In the matter of: -

Mahmed Essan Ramsurrun

Appellant

v

The State

Respondent

JUDGMENT

The appellant was prosecuted before the District Court of Flacq for the offence of illegal trafficking in stolen goods in breach of Section 40A of the Criminal Code. It has been particularized that the appellant dealt with 16 feeder cables and one ground cable. He entered a plea of not guilty. As he was in detention he applied for his release on bail. At the close of the bail hearing the appellant who was assisted by Counsel indicated his will to change his plea. The information was read over to him and he promptly entered a guilty plea and the trial court proceeded with the hearing of the case. The appellant was convicted and sentenced to undergo a term of imprisonment of 3 months.

He is now appealing against the sentence on the following two grounds:

1. Because the sentence is grossly disproportionate having regard to the circumstances of the offence.
2. Because the sentence is, in any event manifestly harsh and excessive and wrong in principle.

The respondent is resisting the appeal.

Both grounds of appeal were argued together. It is submitted on behalf of the appellant that the trial court did not motivate the sentence of imprisonment inflicted upon the appellant. He further submitted that the learned Magistrate did not consider whether a community service order could have been appropriate.

Counsel for the respondent replied that the sentence meted out was neither manifestly harsh and excessive nor wrong in principle but is on the lower end of the spectrum. She referred to a

number of decided cases where the Supreme Court did not find it appropriate to consider a community service order and further submitted that the learned Magistrate's approach to sentencing. In her opinion, the three months imprisonment are well deserved taking into account the aggravating factors, mitigating factors and the guilty plea which was not tendered at the first opportunity.

At this juncture it would be apposite to refer to the sentence handed down by the trial court:

> "*Having regard to the facts and circumstances of his case, the guilty plea of accused, his previous with no cognate, days spent in police cell and on remand, this Court order the accused to undergo a term of imprisonment of 3 months- Rs 100 costs. Days spent on remand to be deducted and day spent in police cell to be deducted*."

The first and immediate impression that is being conveyed from a reading of the above is that, quite apart from the fact that the reasons are cryptic, the reasoning is contradictory. One cannot figure out how given the guilty plea entered by the appellant and his previous convictions for non-cognate offences, which are mitigating in nature, would justify a term of imprisonment.

The Supreme Court has time and again expressed disapproval in the manner of handing down a custodial sentence. There is no reason given at all as to why a custodial sentence was called for. It is not apparent from the judgment to show that the trial court has duly weighed the pros and cons of a custodial sentence: **Koopla v The State [2020 SCJ 101].** Although there is no requirement for a long and elaborate reasons backed by a series of case law, it is required from the sentencing court to, at least, justify why a term of imprisonment is warranted as opposed to other forms of sanctions, particularly of a non-custodial character. It is our view that when the sentencing court is minded to deprive an accused person of his liberty, adequate reasons and justifications have to be set out in the decision in order not only to enable the appellate court to carry out an effective review of the correctness of the decision: **D.P.P v Hinga [2014 SCJ 303]**; but more importantly for the benefit of the accused party himself. A sentence of imprisonment has to be adequately motivated: **Rajackhan v The State [2021 SCJ 388]**. The above sentence is clearly inadequate as it is unclear what were the circumstances of the case which was in the learned Magistrate's mind. It is also obvious that no consideration has been given to the propriety of a community service order.

We would hasten to add that it will be unfair on our part if we were to cast all the blame on the trial court. However lacking the decision of the trial court might be the stance of the then Counsel for the appellant was not without reproach either. Counsel who assisted the appellant before the trial court did not even address the court in mitigation and on alternative methods of dealing with the appellant. According to the court record, he offered no submissions at all. Had the trial court been invited to consider whether a community service order could have been appropriate, as has now been submitted before us, we have no doubt that the trial court would have been alive to that alternative.

We finally wish to point out that there is a wrong perception that a community service order is unduly lenient whereas as it been aptly explained in the following extracts from the case of **Heerah v The State [2012 SCJ 71]**:

> **"[14]** *The assumption in that submission is that a CSO is a let-off for any offender. That myth should be dispelled. A CSO imposes upon an offender "substantial restriction of liberty" and holds him to account to the community for his misdeeds whilst having the additional virtue, as compared to the other forms of punishment, of affording him an opportunity to mend his life in the open. Hence, the choice open to him between serving a prison sentence or avoiding it by doing some useful civic duty to the community and repaying his debt to society.*
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> **[15]** *That a prison sentence is normally appropriate where an offender is convicted for serious offences, of that there is no doubt….Furthermore, not all candidates who fail the test of monetary penalties, or a Probation or Conditional Discharge Order become automatically candidates for prisons…Parliament, in its wisdom, has now added one invaluable and intermediate régime between the custodial option and the non custodial option: that is a suspended prison sentence under the Community Service Order Act.*
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> **[16]** *Courts should refrain from imposing custodial sentences as a matter of reflex and indiscriminately in all cases where fines and Probation Orders and Conditional Discharge Orders are not found appropriate. Serious consideration should be given to that intermediate option…*
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> **[17]** *In a number of cases, the objectives of the criminal justice system are better served when the offender's sense of responsibility to society and his self-reliance are triggered. As the Home Office Paper comments: Imprisonment "is likely to diminish an offender's sense of responsibility and self-reliance," and "provides many opportunities to learn criminal skills."*

In view of the unambiguous plea of guilty entered by the appellant, the latter has been rightly convicted by the trial court pursuant to **Section 72 (2) of the District and Intermediate Courts (Criminal Jurisdiction) Act** which provides that where "the accused admits the truth of the information and shows no sufficient cause why he should not be convicted, then the Magistrate shall convict him, and after hearing such evidence as may be necessary to show the facts and circumstances of the case, shall pass such sentence as the nature of the offence may require." It is

only the sentence which is wanting for failing to give adequate reasons justifying the imposition of a custodial sentence right away but the sentence of imprisonment is not in itself neither wrong in law and in principle and may have been justified in view of the provisions of Section 40A of the Criminal Code which reads as follows:

> **40A. Illegal trafficking in stolen goods and any other goods**
>
> (1) No person shall sell, offer for sale, distribute, import, export, use, lease, hire, supply, trade, or otherwise deal with, stolen goods or such other goods.
>
> (2) Any person who contravenes subsection (1) shall commit an offence and shall, on conviction, be liable to a fine not exceeding 500,000 rupees and to imprisonment for a term not exceeding 2 years.

We were minded to send back the case to the learned Magistrate for her to give adequate reasons which would have warranted the imposition of a custodial sentence outright but we are given to understand that she has now been posted on a different establishment. We would therefore not interfere with the sentence of imprisonment except that serious consideration should be given to an intermediate option. We take the view that there were ample reasons for the learned Magistrate to consider whether the term of imprisonment could have been suspended for the purpose of making a community service order. We allow the appeal and find no hurdle in sending back the case to the Magistrate in Charge of the District Court of Flacq directing him to proceed in accordance with the procedures set out in Sections 3, 4, 5 and 6 of the Community Service Order Act and if the conditions are met, to suspend the custodial sentence and make a community service order. Given the circumstances, we shall make no order as to costs.

P. M. T. K. Kam Sing
Judge

C. Green-Jokhoo
Judge

24 May 2023

Judgment delivered by Hon. P. M. T. K. Kam Sing, Puisne Judge

For Appellant	**:**	**Mr H. K. Fulena, Attorney-at-Law** **Mr C. Baboolall, of Counsel together with Mr S. Y. S. Bandhu**
For Respondent	**:**	**Chief State Attorney** **State Counsel**