M. E. RAMSURRUN v THE STATE

2023 SCJ 199
Record No. 9516

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 unlawfully dealt with copper coaxial cables. After initially pleading not guilty to the information, the appellant changed his plea subsequently to one of guilty. He was legally assisted during the hearing. The appellant was convicted and sentenced to undergo a term of imprisonment for a period 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 richly deserved as commensurate with the seriousness of the offence so that it is neither manifestly harsh and

excessive nor wrong in principle. He further referred to a number of decided cases where the Supreme Court did not find it appropriate to consider a community service order.

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

> *"Having regards to the nature of the offence, the guilty plea of accused, his previous with no cognate, days spent on remand this Court orders the accused to undergo a term of imprisonment of 3 months + Rs 100 costs…"*

The issues in the present appeal are similar to those raised in the case of **M. E. Ramsurrun v The State SCR 9515** which was heard on the same day. Since the two appeals are based on two different and separate facts, we would therefore deliver two distinct decisions but the gist of our analysis will remain the same.

The immediate impression that is being conveyed from a reading of the above is that it is unclear whether the above considerations which the learned Magistrate had in mind were that they were mitigating in nature and she gave a term of imprisonment of a lesser period or that the offence was of such a nature that in spite of the mitigating factors, a custodial sentence was nevertheless called for.

The Supreme Court has time and again expressed disapproval in the cryptic manner in handing down a custodial sentence. 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 long and elaborate reasons what is required from the sentencing court is to, at least, justify why a term of imprisonment is warranted in spite of a plethora of penalties of non-custodial character that were available. 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 for the benefit of the accused party himself but also in order 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]**. A sentence of imprisonment has to be adequately motivated: **Rajackhan v The State [2021 SCJ 388]** and the above sentence is clearly inadequate as to the factors which were weighed by the learned Magistrate to hand down a custodial sentence outright. It is equally obvious that the trial court did not explore the possibility of making a community service order taking into the account the rather short term of imprisonment inflicted and the fact that community service is not specifically excluded by law for a conviction for the present offence.

However lacking the decision of the trial court might be, it would be unfair not to comment on the stance of the then Counsel who appeared for the appellant which was not without reproach either. The then Counsel who assisted the appellant before the trial court offered no submissions at

all thus he did not address the court in mitigation and on alternative methods of dealing with the appellant. Had the trial court been invited to consider whether a community service order could have been appropriate, as has been submitted before us, we have no doubt that the trial court would have given due consideration to that alternative.

It has been aptly explained in the case of **Heerah v The State** **[2012 SCJ 71]** the following, in respect of a community service order:

> **"[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 being criticised for want of adequate reasons justifying the imposition of a custodial sentence right away although a sentence of imprisonment of 3 months is not in itself wrong in law and may have been justified in view of the fact that upon conviction for an offence under Section 40A of the Criminal Code an offender is 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 is now 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 as highlighted in the case of **Heerah** (supra). We are of the view that ample reasons were before the learned Magistrate for her 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 send back the case to the District Court of Flacq directing the Magistrate in Charge 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