

IN THE SUPREME COURT OF SEYCHELLES

CriminalSide: CN 01/2016

Appeal from Magistrates Court decision 25/2014

[2017] SCSC 466

STEVEN MICHAEL AUGUSTE

Appellant

versus

THE REPUBLIC

Heard:

Counsel: Mr. N.Gabriel for appellant

Mrs. M. Ibrahim, State Counsel for the Republic

Delivered: 8 May 2017

JUDGMENT

Vidot J

[1] This is an appeal against sentence only. The Appellant was charged with 2 counts and he pleaded guilty on both counts and was accordingly convicted and sentenced. The offences the accused was convicted of and sentenced for are;

- (i)** Burglary contrary to and punishable under Section 289(a) of the Penal Code, and
- (ii)** Stealing contrary to Section 260 of the Penal Code

The Appellant was sentenced to 3 years in respect of the burglary charge and 2 years in regards of the 2nd charge of stealing. Both sentences were to run concurrently but consecutive to any prison term he was then serving. The total value of the items stolen which were mainly electronics was SR49,800/-.

[2] The prescribed penalty for the first offence is a mandatory minimum of 15 years as provided by Act 5 of 2015 whilst that for the second offence is carries a minimum mandatory of 5 years.

[3] The grounds of appeal as per the Memorandum of Appeal are as follows;

(a) The total sentence of 3 years imprisonment imposed on the Appellant by the Learned Magistrate should have been made to run concurrently with the previous sentence of 15 months he was serving.

(b) The Learned Magistrate failed to consider the young age of the Appellant and the fact that the items stolen were retrieved.

[4] Learned Counsel for the Appellant called on the court to order that the sentence be made to run concurrently with another sentence the accused was serving. It is clear that Counsel was not arguing that the sentence was unlawful but merely wrong in principle and therefore harsh and manifestly excessive. It is his contention that in making the sentence run consecutive to the previous sentence, justice was not done. He further argued that the “totality principle” as laid down in **John Vinda v Republic CN 6 of 1995** had not been observed.

[5] On its part, the Republic supported the sentence and maintained that it was lawful, appropriate and met the course of justice in this case. Learned Counsel, Mrs. Ibrahim emphasized that the Appellant had to discharge the burden of establishing that the trial court’s sentence was unreasonable and relied on **Naiken v Republic [1981] SLR** and that the sentence should only be overturned only if it is clearly wrong in principle or manifestly harsh and excessive.

[6] It is trite, and I agree with Counsel for the Appellant that an appellate court should not interfere with a sentence meted out by a lower court unless the sentence imposed in

wrong in law and/or on principle or some material factor was overlooked or that the sentence is manifestly harsh and excessive; see, **Mathiot v Republic SCA 9 of 1993**. It is necessary to note as well that the purpose of a sentence is deterrent, preventive, reformatory and retributive. However, a sentence should always conform to law and be just and fair and the punishment should meet the criminal as well as the crime as pronounced in **S v Van der Westhuizen [1974] (4) SA 621** and **S v Sparks 1972 (3) SA 396**.

- [7] Section 36 of the Penal Code provides the general rule applicable in imposing cumulative sentences and it reads thus;

“Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court direct that it shall be executed with the former sentence or of any part thereof”.

In the present case, the Appellant argues that invoking the principle of totality of sentence would justify the application of the exception to the general rule of consecutive sentence permitted by the said Section 36; see **John Neddy Onezime v Republic SCA 6 of 2013** and **John Vinda v Republic Cr. App 6 of 1995** (unreported). Nonetheless, it remains a fact that consecutive sentence is the rule and concurrent sentence the exception. Therefore, it was entirely proper for the Learned Magistrate to impose such a consecutive sentence. It was lawful. The Appellant’s contention is that it was wrong in principle.

- [8] I note also Section 9 (1) of the Criminal Procedure Code that provides for possibility of consecutive sentence in circumstances where an accused is convicted at one trial of two or more distinct offences, as in the present case. The Learned Magistrate in considering the particularities of this case, and in my opinion correctly decided to impose concurrent sentences especially since the offences the Appellant was charged with arose from one transaction; see **Folette v R [2013] SLR 237**. In **John Vinda v Republic** (supra) held that sentences should be made to run consecutively unless the sentences be considered to be “*part and parcel of the same transaction*” In the present case the Learned Magistrate correctly treated the offences under both counts with which the Appellant stands charged

as part and parcel of the same transaction and meted out a concurrent sentence. The Learned Magistrate however, relying on Section 36 decided that these sentences would be consecutive to a sentence the Appellant was already serving.

- [9] The Appellant also argued that since the offences for which he was convicted and sentenced in this case “occurred at a relatively short period of time” from the case he was already serving a prison term, he should benefit from a concurrent prison term. I disagree with such proposition put forward by the Appellant and state that an accused should not be made to escape appropriate and just punishment for his offences and this was the sentiment echoed in **John Vinda v Republic** (supra) relied on by the Respondent;

“Convicted persons should not be left with the impression that they can go on a rampage and come to court, plead guilty and escape punishment with one effective prison sentence in respect of several offences”.

Reading from the proceedings, I cannot find any records of the facts of the previous case for which the Appellant was serving an offence. All that the Learned Magistrate was privy to was the fact that at the time of sentence, the Appellant was serving a term 15 months imprisonment. Therefore, this argument fails.

- [10] The Appellant had argued that the sentence was wrong in principle because the Learned Magistrate failed to address himself to the principles of totality and proportionality of sentence and therefore the sentence meted out did not do justice to the case. I cannot find favour with the Appellant’s argument on this issue. I have above addressed the provisions of Section 36 of the Penal Code. I also note that in his sentence the Learned Magistrate clearly stated; *“I have taken the two principles into account in deciding the right sentence to be imposed”*. He goes on to identify these principles as *“the principle of proportionality”* and the *“principle of totality”*. The Learned Magistrate was therefore fully aware of the need to consider these principles in imposing sentence, which he did. Maybe the next question to be considered would be if the Learned Magistrate applied those principles correctly.

- [11] In the case of **Davis Accouche v Republic CN08/2015**(unreported) cited by Learned Counsel for the Respondent, the court relied on **R v Reeve 2 Cr. App. Report** which

held that it was the duty of the court which passes a numbers of consecutive sentences to review the aggregate of the sentences and consider whether the aggregate sentence is just and appropriate. In the present case, the Learned Magistrate gave consideration to the fact that most of the stolen items had been recovered. He was further prepared to depart from mandatory minimum sentences that the law provides for the offences the Appellant was convicted of. He applied the principles set down in **Ponoo v AG SCA 38/2010** which allows for imposition of sentences that are lower than the mandatory minimum. Instead of serving 15 years which is the mandatory minimum for burglary, he was only given a sentence of 3 years. This also shows that the trial court had not interpreted Section 36 of the Penal Code on a strict application. Therefore, this court finds no merit on the Appellant's argument that applies the principles of "totality of sentence" and "proportionality of sentence".

[12] I therefore dismiss the first ground of appeal.

[13] The second ground of appeal addresses allegation that the Learned Magistrate failed to take into account the young age of the Appellant. In his filed written submission, Counsel for the Appellant did not address that issue, Therefore, I take it that that ground has been abandoned. Nonetheless, I note that the same was not brought out in mitigation. The Appellant only pleaded for leniency due to the fact that he has children and health issues. That ground of appeal addressed the fact that most of the stolen items were recovered. I believe that in meting out sentences far below the prescribed mandatory minimum and applying **Ponoo**, the trial court was taking that fact into consideration. I therefore find no merit in this ground of appeal and therefore dismiss it.

[14] The Prosecution has prayed to court to invoke Section 30A of the Penal Code and make an order of compensation against the Appellant. Section 30A (1) reads as follows;

"Notwithstanding Section 30 and any other written law to the contrary, where a person is convicted of an offence under Chapter XXVI, Chapter XXVIII or Chapter XXIX, the court shall (underline mine), in addition to the sentence prescribed for the offence, order the person to compensate the owner of property who was deprived of that property as a result of the commission of the offence"

The offences (as identified in paragraph 1 above) for which the Appellant was convicted and sentenced fall respectively under Chapter XXIX and Chapter XXVI. Learned Counsel for the Respondent cited **Roddy Lenclume v Republic SCA 32/2013** in which the Court of Appeal imposed a compensation Order after the trial Magistrate had failed to do so.

This Court is fully conscious that a compensation order as per Section 30A (1) was warranted in this case. I assume that in consideration that most of stolen items were recovered and mitigating factors did not impose such an order. I most strenuously believe that it should have been done, but since the value of the unrecovered items was not made known to court, this Court would not be in a position to acquiesce to the demand to impose a order of compensation that is just and adequate in the circumstances of this case.

[15] The appeal is therefore dismissed and sentence confirmed.

Signed, dated and delivered at Ile du Port on 8 May 2017

M Vidot
Judge of the Supreme Court