IN THE SEYCHELLES COURT OF APPEAL

JOHN VINDA

V.

THE REPUBLIC

Criminal Appeal No. 6 of 1995

Before H. Goburdhun, P., A.M. Silungwe, E.O. Ayoola, JJA.

Mr. J. Renaud for the appellant
Mr. Fernando for the respondent

JUDGMENT OF THE COURT

On March 3, 1995, at the Magistrates" Court 'A' the appellant was convicted of the following offences: On charge No.150/95 of housebreaking in the first count and stealing in the second count; on charge No.151/95, another housebreaking in the first count and stealing in the second count; on charge No.152/95 - another housebreaking in the first count and stealing in the second count; on charge No.153/95, as in the previous charges, housebreaking and stealing respectively.

He was sentenced by the Senior Magistrate for each of the several offences of housebreaking to terms of imprisonment of 2 years and of 18 months for each of the several offences of stealing, except in charge No.151/95 for which the terms of imprisonment were 1 year and 6 months respectively for the offences of housebreaking and stealing. The sentences in each charge were ordered by the Senior Magistrate to be concurrent. However, the learned Senior Magistrate directed that the concurrent sentences in each of the other charges were to run concurrently with the sentences in charge 150/95. In the result, although in the totality the appellant was sentenced to seven years imprisonment

he would serve only two years.

By a letter dated 10th March 1995, the Attorney General reported the proceedings to the Supreme Court and invoked the power of the Supreme Court pursuant to section 328 of the Criminal Procedure Code (Cap. 54) for a revision of the order made by the learned Senior Magistrate for the concurrent execution of the sentences. Upon the matter coming before the Supreme Court, the learned Chief Justice after hearing counsel on behalf of the Attorney General and the appellant in person reversed the order for concurrent execution and ordered that the sentences be made to run consecutively. In the result, he ordered that the appellant "will serve a total of 5 years and 3 months in prison instead of two years." It is expedient to observe that although the record of appeal shows on page 8 that the total concurrent sentence imposed on the appellant in charge No.152/94 was two years imprisonment both the warrant of commitment on page K of the record and the Attorney-General's letter on pages H1 and H2 showed three months imprisonment. This disparity has not been explained. If we rely on the record of proceedings before the Senior Magistrate (copied on pages 2-8 of the record of appeal) and if sentences were to be executed consecutively, the appellant should serve a term of seven years and not five years and three months.

The factors which the learned Chief Justice took into consideration in reversing the directive of the Senior Magistrate can easily be summaried from his very clear and well reasoned judgment. The Chief Justice was of the view that the offences for which the appellant was convicted are all serious offences of which the maximum sentences are respectively 7 years and 5 years for housebreaking and stealing. Although the offences were committed by the appellant within a radius of two miles from one another, they were committed on separate days and occasions. As rightly put by the learned Chief Justice: "They were related in

nature only but unrelated in space and time "and" in three of the cases, different victims were involved." Having noted the upsurge in housebreaking and stealing offences the learned Chief Justice adverted to the need to protect law abiding citizens and not to encourage offenders. He stated:

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

and also:

> "In principle, sentences ought to be passed for separate offences and should be made to run consecutively unless the offences could be said to be part and parcel of the same transaction."

As earlier stated, the Chief Justice reversed the order made by the Senior Magistrate.

The appellant has appealed from the decision of the Chief Justice, raising by the memorandum of appeal filed by counsel on his behalf, in the vaguest terms, the grounds that the sentences "are excessive and wrong in principle" and that the Chief Justice "erred in reversing the judgment of the Court below." Expatiating on these grounds which ought to have been particularised in the memorandum of appeal, counsel on behalf of the appellant argued, in effect, that the Senior Magistrate had "the feel" of all the cases, was aware of the circumstances and of the previous conviction of the appellant and the danger caused both to national economy that might be occasioned by the offences of their nature, but nevertheless exercised the discretion which he has pursuant to section 36 of the Penal Code to order execution of the sentences to run concurrently. It was argued that the Chief Justice did not examine the factors which influenced the Senior Magistrate's exercise of discretion. We were referred to the cases of

P.P. v. Tardrew (1986) LCR (Crim.) 968; and R. v. Puru (1985) LCR (Crim.) 877.

Section 36 of the Penal Code provides that:

> "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, other than a sentence of death or of corporal punishment, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or of any part thereof."

It is evident from the provisions of section 36, quoted above, that in the circumstances specified by that section consecutive execution of sentences is the rule and concurrent execution of sentences is the exception. It follows, in our view, that where a directive which is the exception is made by the trial court the factors and special circumstances for such directive should be manifest from the order or demonstrated by the trial court in its ruling. One such circumstance which may justify an application of the exception would be the disproportionality of the totality of consecutive sentences to the totality of the behaviour of the convicted person or the gravity of the offence. In Archbold Criminal Pleading, Evidence and Practice 1992 para. 5-166 the following passage which is relevant occurs:

> "While it is impossible to indicate the effect of the "totality principle" with precision, it appears to be recognised in three situations in particular - where the offender has committed a series of offences of moderate gravity and has received an aggregate sentence equivalent to the sentence which would have been imposed for an offence of a much more serious nature (see R. v. Holdernon July 15, 1974 CSP A5, 3(b)); where the offender is relatively young and has not previously served

> a custodial sentence (see R. v. Koyce (1979) 1 Cr. App. R. (S) 21, CSP A5, 3(c)), and where an offender who is sentenced to a long term of imprisonment for a grave crime is also liable to be sentenced to a much shorter term for some other matter...."

We venture to think that the "totality principle" when properly applied may justify the application of the exception permitted by section 36 to the general rule of consecutive execution of sentence.

In the present case, however, there was insufficient demonstration by the Senior Magistrate of the reasons and factors which influenced the application of the exception. Evidently, the Senior Magistrate did state the reasons why he imposed the sentences he pronounced in each of the charges. There is no challenge to the exercise of his undoubted discretion to impose those sentences. The only clear reasons he stated for imposing concurrent sentences for separate chargesare that the series of offences were committed more or less during the same period in the same area and the need to "apply the principle of totality of sentencing on humanitarian grounds." These, in our view, are hardly good enough reasons for directing that the sentences should run concurrently. It cannot be said that the offence of housebreaking accompanied by stealing is not of sufficient gravity to attract on the totality a sentence of 5 years 3 months imprisonment.

In the result, we hold that the learned Chief Justice was justified to revise the learned Senior Magistrate's directives. Had the totality of the sentences imposed in respect of the charges been seven years, as the records would tend to indicate, we might have been inclined to view such total sentence as excessive. However, the total sentence which the learned Chief Justice ordered the appellant to serve is 5 years and 3 months imprisonment which we do not consider wrong in the circumstances.

In the result, this appeal fails and is hereby dismissed.

H. GOBURDHUN
(PRESIDENT)

A.M. SILUNGWE
(JUSTICE OF APPEAL)

E.O.AYOOLA
(JUSTICE OF APPEAL)

Delivered on the 19th day of October, 1995.

The appeal is allowed with costs.

L.E. VENCHARD
JUDGE

~~I agree~~

~~E. O. AYOOLA~~

~~Justice of Appeal~~

Judgment read in open court in the presence of counsel.

A. [illegible]
JUDGE
07/11/95