(19)

IN THE SUPREME COURT OF SEYCHELLES

GEORGES OREDDY APPLICANT

VERSUS

REPUBLIC RESPONDENT

Criminal Appeal 5 of 1997
Mr A. Derjacques for the appellant
Miss K. Domingue for the Republic

JUDGMENT

Perera J

The appellant was charged with the offences of housebreaking contrary to Section 289 (a) of the Penal Code, and stealing from a dwelling house, contrary to Section 260 of the Penal Code. Those offences were alleged to have been committed on 11th March 1996.

The Appellant, who was legally represented before the Magistrates Court pleaded guilty on both counts, and the Learned Magistrate (Mr M. Waidyatilleke) made the following order in imposing sentence.

> "I have considered the plea of the convict and the mitigatory circumstances and that he is serving a term of 7 years. Therefore I impose a term of 5 years on each count. The

present term to run concurrently with
the term he is already serving".

In this appeal against sentence, it has been submitted that the appellant was not serving a 7 year sentence, but a 3 year term imposed on him on 13th March 1996 for a similar offence.

The Learned State Counsel concedes that at the time the appellant was sentenced in this case on 5th May 1997, the appellant had only a balance period of 18 months to be served from the 3 year sentence imposed on 13th March 1996 in case no. 232/96 of the Magistrates' Court.

Mandatory sentences of imprisonment were prescribed by the Penal Code (amendment) Act 1995 (Act No. 16 of 1995) in respect of persons convicted of offences specified under chapters xxviii and xxix of the Penal Code. This amendment came into operation on 30th October 1995, and hence as the offences the instant appellant was charged with were committed on 11th March 1996, the amending Act applied. However the mandatory sentence was applicable only to count 1 for housebreaking contrary to Secton 289(a), that Section being under Chapter xxixx. The amending Act enhanced the punishment for this offence from 7 years to 10 years imprisonment. Hence under Section 27A(i) (b), since the appellant had been convicted of a similar offence within 5 years prior to the date of conviction, a mandatory sentence of not less than 5 years had to be imposed.

The punishment for the offence of stealing, contrary to Section 260 of the Penal Code falls under Chapter xxvi which is outside the ambit of mandatory sentences. However the amending Act enhanced the punishment from 5 years to 7 years imprisonment.

The Learned Magistrate imposed a term of 5 years imprisonment on each count but did not specify whether the sentences on the two counts were to run concurrently or consecutively to each other, although he stated that the present sentences should run concurrently with the term he is already serving.

Section 9 of the Criminal Procedure Code (Cap 54) provides that -

> "9(1) When a person is convicted at one trial of two or more distinct offences, the court may sentence him for such offences to the several punishments prescribed therefor which such court is competent to impose, such punishments when consisting of imprisonment to commence the one after expiration of the other in such order as the court may direct, unless the court directs that such punishments shall run concurrently.

(2) For the purposes of Appeal, the aggregate of consecutive sentences imposed under this Section in case of convictions for several offences at one trial shall be deemed to be a single sentence."

Thus, in terms of sub-section 1 of Section 9, as the court has not used its discretion and directed that the terms of 5 years imposed on each count shall run concurrently, it is deemed to be a consecutive sentence, which under sub section 2 should be considered as a single sentence of 10 years imprisonment.

When the present sentences were imposed, on 5th May 1997 the appellant had 10 months and 1 week to spend on the 3 year sentence he was serving since 13th March 1996. However had he been given the 1/3 remission, that term would have ended on 13th March 1997, and from that day, till he was sentenced on 5th May 1997 (a period of 21 days) he would have been considered as a remand prisoner for the purposes of this case. However as remission of sentence is a purely discretionary power vested in the Superintendant of Prisons by virtue of Section 30 of the Prisons Act (Cap 180), this court would consider that there was no remission of the 3 year sentence imposed on 13th March 1996.

In the instant case, the appellant has urged that the sentences imposed are harsh and excessive. The sentence of 5 years imposed on count 1 is a mandatory term under Section 27A(1) (b) of the Penal Code. As the Learned Magistrate had exercised his discretion under Section 36 of the Penal Code and directed that the present sentences should run concurrently with the former sentence, this court will not interfere with that order.

However as the Learned Magistrate imposed a consecutive sentence aggregating to 10 years on the erroneous premise that the appellant was already serving a 7 year sentence, and that he ordered the present sentence to be concurrent to the existing sentence, it is apparant that he did not intend to impose a 10 year sentence on the present charges.

Hence acting in terms of Section 316 (a) (iii) of the Criminal Procedure Code, I alter the sentence, so that the sentences of 5 years imposed on each count would run concurrently with each other as well as concurrently with the term of imprisonment the appellant was serving at the time of the sentencing in this case.

Subject to this variation, the Appeal is otherwise dismissed.

A.R. PERERA

JUDGE

Dated this 26th day of June 1998