

**IN THE SEYCHELLES COURT OF APPEAL**

Excel Jean

**APPELLANT**

**VS**

The Republic

**Respondent**

**SCA CR No: 12 of 2012**

**BEFORE:** MacGregor, Fernando, Msoffe, JJA

**COUNSEL:** Mr. N. Gabriel for Appellant  
Mr. M. H. Kumar for the Republic

Date of Hearing: 5<sup>th</sup> August 2014

Date of Judgment: 14<sup>th</sup> August 2014

**JUDGMENT**

**A.F. T. FERNANDO. JA**

1. This is an appeal from a judgment of the Supreme Court which had been rendered on hearing an appeal against a sentence imposed by the Magistrate's Court on a conviction of a charge of criminal trespass contrary to section 294(2) of the Penal Code.

2. The appeal is on the legality of the sentence imposed as per the Amended Notice of Appeal. It is the position of the Appellant that the learned Judge failed to consider concurrent sentencing for the Appellant who was already serving a long term imprisonment. As per the Skeleton Heads of Arguments the Appellant who was convicted on a charge of criminal trespass by the Magistrates Court “was sentenced to three years imprisonment to run consecutively to the nine years he was already serving in other cases involving housebreaking and stealing.”(emphasis by us)
3. The Appellant was convicted on his own plea of guilt. The Appellant had admitted to the fact that he had entered into the property in the possession of another with intent to commit the offence of theft, when the particulars of the offence had been read out to him.
4. The Appellant had been sentenced by the Magistrate’s Court to a period of 3 years imprisonment to run consecutively, to the nine years he was already serving, in respect of the offence of housebreaking and stealing, which had been committed on the same day as the offence of criminal trespass was committed. He had appealed to the Supreme Court against the sentence imposed and the Supreme Court sitting on appeal had varied the sentence of three years to one of two years, but the 2 years sentence in the case of criminal trespass was ordered to run consecutive to the sentence of 9 years imposed in respect of the offences of housebreaking and stealing.

5. Section 36 of the Penal Code states:

“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 concurrently with the former sentence or of any part thereof;.....” (The amendment to the Penal Code by the (Amendment) (No. 2) Act 20 of 2010 does not apply to this case as it came into effect after the date of the commission of the offence pertaining to this appeal and has not been set out here).

6. Section 9 of the Criminal Procedure Code states:

“(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 the 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 purpose 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.”

7. From both these provisions in the Penal Code and Criminal Procedure Code pertaining to sentencing, it is clear the rule is that the sentences shall run consecutively and the exception is where the court directs that it shall be executed concurrently with the former sentence or of any part thereof.
8. It is only in a case when a person is convicted at one trial of two or more distinct offences and the court has imposed the punishments in respect of such offences to be executed consecutively, that for the purpose of appeal the aggregate of consecutive sentences imposed shall be deemed to be a single sentence. This is because the appellate court hearing the appeal can then consider whether the aggregate of consecutive sentences imposed by the sentencing court on the accused for the several offences of which he was charged together in the same indictment, is in proportion to the totality of the behavior of the convict or the gravity of the offences committed. In such cases the appellate court is seized of all the particulars pertaining to the several charges that had been leveled against the accused. For instance if an accused had been indicted in one indictment for criminal trespass, housebreaking, and theft committed in the course of the same transaction and the particulars are known to the appellate court the aggregate of consecutive sentences imposed on the several charges becomes a relevant consideration in determining whether the sentence is fair and in proportion to the totality of the behavior of the convict or the gravity of the offences committed. It would be inappropriate for a court to impose a sentence to run concurrently with other sentences already imposed on the accused in several other cases without being privy to the facts of the other cases. If that were to be the case an accused would escape punishment wholly or partly for the subsequent offence/s committed on the basis he is already serving sentences or a sentence imposed in respect of other cases or a case. There is no appeal before us of the case of housebreaking and stealing of which the Appellant was convicted and sentenced to a period of nine years imprisonment.

9. We are conscious of the fact that joinder of counts under section 112 of the Criminal Procedure Code in an indictment is the prerogative of the Attorney-General and it is possible for him to file several indictments instead of one in respect of offences even though founded on the same facts or form, or are a part of, a series of offences of the same or similar character to avoid the application of the provisions of section 9(2) of the Criminal Procedure Code and to press for stiffer sentences. In such a scenario it will be up to the Appellant to bring this to the attention of the sentencing or appellate court. As stated earlier there is no appeal before us of the case of housebreaking and stealing of which the Appellant was convicted and sentenced to a period of nine years imprisonment nor had the Appellant impressed upon us that the offence of criminal trespass should have been dealt with as being part of the other offences of house breaking and stealing.
10. The Appellant had also in his Skeleton Heads of Arguments urged that the “Court below did not seriously take into account the recommendation of the probation report”. Counsel of the Appellant pleading in mitigation before the sentencing Magistrate, has moved court to consider the probation report, requested court to give the Appellant another opportunity and stated that “All his family members have expressed disappointment of his behavior.”
11. As per the recommendation in the Probation Report:
  - a) “The Appellant had shown remorse to the Court for his wrongful actions by pleading guilty and not wasted the precious time of court,
  - b) He is anxious of his present predicament,
  - c) He is an adult and is aged 45 years and has little or no support or guidance from his family due to his present situation.”

We are not surprised as to why the Learned Magistrate and the Supreme Court Judge hearing the appeal had decided to disregard the recommendations. Point (a) is a matter for the sentencing court and not a matter for the probation officer, as regards point (b) any convict will be anxious of his predicament and not a matter for consideration of the sentencing court or the appellate court and point (c) is not something exceptional that the sentencing court should have necessarily considered in passing sentence.

12. We therefore have no hesitation in dismissing this appeal.

A.F. T. Fernando  
Justice of Appeal

I agree

F. MacGregor  
President of the Court of Appeal

I agree

J. Msoffe  
Justice of Appeal

Dated this 14<sup>th</sup> day of August 2014, Victoria, Seychelles