

**IN THE SEYCHELLES COURT OF APPEAL**

**[Coram: S. Domah (J.A) ,A.Fernando (J.A) ,J. Msoffe (J.A)]**

**Criminal Appeal SCA 26/2014**

**(Appeal from Supreme Court Decision CA 22/2011)**

**Out of Case Nos. 801, 802 & 803/2010**

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Mervin Rath

Appellant

Versus

The Republic

Respondent

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Heard: 30 November 2016

Counsel: Mr. Nichol Gabriel for the Appellant

Ms. Lansinglu Rongmei for the Respondent

Delivered: 09 December 2016

**JUDGMENT**

J. Msoffe (J.A)

[1] In the Magistrates' Court the Appellant was faced with three cases of breaking and stealing in the house of Mary-Anne Edmond at St. Louis, Mahe. In Criminal Case No.801/10, it was alleged that on 28<sup>th</sup> October 2010 he broke into the complainant's house and stole an assortment of articles worth Rs.26,241.00. In Criminal Case No.802/10, the allegation was that on 2<sup>nd</sup> November 2010, he broke into the said house and stole articles worth Rs.8,365.00. Finally, in Criminal Case No.803/10, it was alleged that on 8<sup>th</sup> November 2010, he broke into the said house and stole articles worth SR6000.00.

[2] On 7<sup>th</sup> October 2011 and 25<sup>th</sup> October 2011, respectively, he pleaded guilty to the respective counts. On this latter date he was accordingly sentenced as under:-

(a) *Case No.801/10: 1<sup>st</sup> Count – 8 months imprisonment and 2<sup>nd</sup> Count – 4 months imprisonment, to run consecutively and time spent on remand to be deducted from sentence.*

(b) *Case No.802/10: 1<sup>st</sup> Count – 8 years imprisonment and 2<sup>nd</sup> Count – 9 months imprisonment, to run consecutively after expiration of sentence in Case No.801/10.*

(c) *Case No.803/10: 1<sup>st</sup> Count – 8 years imprisonment and 2<sup>nd</sup> Count – 9 months imprisonment and 3<sup>rd</sup> Count – 3 months imprisonment. The sentence of Count 2 and 3 to run concurrently but to run consecutively with sentence of Count 1 and the sentence in Case No.803/10 to run consecutively after expiration of sentence in Case Nos.802/10 and Case No.803/10.*

[3] Aggrieved, the Appellant appealed to the Supreme Court. His appeal was partly allowed in the sense that the Judge opined and considered that he had readily pleaded guilty and thus varied the sentence as follows:-

*In case No 801/10 on the charge of housebreaking the term of 8 months imprisonment to run concurrently to the term of 4 months imprisonment for the offence of stealing.*

*In Case No 802/10 on the charge of housebreaking, the term of 8 years imprisonment to run concurrently to the term of 9 months imprisonment for the offence of stealing. No sentence is imposed*

*in respect of count 3 which is similar in nature. However it is further ordered that this term of imprisonment run consecutively and therefore after the expiration of the sentence in Case No 801/10.*

*In Case No 803/10 on the charge of housebreaking to a term of 8 years imprisonment to run concurrently to the term of 9 months imprisonment for stealing. It appears no 3<sup>rd</sup> count exists in the charge sheet in Case No 803/10 and therefore the sentence inadvertently imposed is set aside. It is further ordered that this term of imprisonment runs consecutively and therefore after the expiration of the sentences imposed in Cases 801 and 802/10.*

[4] Following the variation, the Appellant was to serve a term of 16 years and 8 months imprisonment with a further order for the time spent in remand custody to count towards sentence.

[5] Still aggrieved, the Appellant has preferred this appeal in which there are four grounds of complaint, to wit:-

a) The total sentence of sixteen years and eight months imprisonment imposed by the learned Judge is manifestly harsh, excessive and wrong in principle.

b) The total sentence of sixteen years and eight months imprisonment imposed on the Appellant by the learned Judge

should have been made to run concurrently with the previous sentence he was serving.

- c) The learned Judge failed to apply correctly the principle of proportionality and totality of sentences.
- d) The learned trial Judge failed to consider the young age of the Appellant and the small value of the items stolen.

[6] In our appreciation of the above grounds of appeal, it occurs to us that the appeal is essentially centred or premised on the gravity of the sentences and the alleged failure by the Judge to apply correctly the principle of proportionality and totality of sentences. With this understanding in mind, we propose to dispose of the appeal generally as shall be demonstrated hereunder.

[7] The law on sentencing is settled in this jurisdiction and beyond. Indeed, there is no dearth of authorities on the subject. For instance, the law has always been that an appeal court will only interfere in a sentence meted by a lower court where the court acted on a wrong principle, or overlooked some material factor, or the sentence is manifestly excessive, etc. – See **Dingwall v R**, Seychelles Law Reports 1966 at page 205; **Mathiot v Republic**, SCA 9/1993, to mention just a few authorities on the point.

[8] While it is common knowledge that the purposes of punishment are deterrent, preventive, reformatory and retributive, etc, it is also true that in sentencing there are other considerations that could be taken into account. For example, in **S v Van der Westhuizen** 1974 (4) SA 621 C, Baker, J. stated that consideration should be given to the crime, the criminal, society

and the element of mercy. But it must also be borne in mind that the consideration of mercy should not lead to condonation or minimization of serious crimes. The sentence should always be just and appropriate. As in **Westhuizen** (supra), in **S v Sparks** 1972 (3) SA 396 (a) 410 H, Holmes, JA made more or less the same point that punishment should meet the criminal as well as the crime, be fair to the State and to the accused, and be blended with a measure of mercy.

[9] There is no dispute that breaking/burglary is a serious criminal offence. It is no wonder that in **R v Saw** [2009] 2 Cr. App. R (s) the court ruled that particular focus is required on the impact of the offence on those living in the burgled house, etc. However, our view is that ultimately each case has to be decided on the basis of its own facts and circumstances.

[10] For purposes of our decision in this matter the starting point will be section 36 of the Penal Code which reads:-

*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 directs that it shall be executed concurrently with the former sentence or any part thereof:*

*Provided that it shall not be lawful for a court to direct that a sentence under Chapter XXVI, Chapter XXVIII or Chapter XXIX be executed or made to run concurrently with one another or that a sentence of imprisonment in default of a fine be*

*executed concurrently with the former sentence under section 28(c)(i) of this Code, or any part thereof.*

[11] In **John Vinda v R** [1995] SCA, this court held that in terms of the above provision, consecutive execution of sentence was the rule and concurrent execution the exception. The court went on to hold that:-

*One such circumstance which may justify the application of the exception would be the disproportionality of consecutive sentences to totality of behaviour of the convicted person or the gravity of the offence.*

[12] Also in **Neddy Onezime v R**, SCA No.6 of 2013 this Court stated:-

[7] *In our plain reading of section 36, we are in agreement with the Respondent that consecutive sentencing is the rule and concurrent sentencing is the exception. It is also true that under the proviso thereto “it shall not be lawful for a court to direct that any sentence under Chapter xxvi, Chapter xxviii or Chapter xxix be executed or made to run concurrently with one another .....” In other words, in an ideal case, a sentence under any of the above Chapters has to run consecutively with a previous sentence. Hence, in law the order for consecutive sentence ordered in this case is well grounded in terms of section 36.*

[8] *Notwithstanding the above general position of the law, the question in this case is whether **in the justice of this case** the order for consecutive sentence meets the best interests*

*of justice. This is the crucial question we have to answer for purposes of a fair decision in the matter. In answering the above question we are satisfied that this Court's decision in **Jean Frederick Ponoo v The Attorney General**, SCA 38/2010, provides useful inspiration. We are aware that in **Ponoo** the issue before the court was the constitutionality or otherwise of section 27A(1)(c)(i) and section 291(a) of the Penal Code whereas in this case the constitutionality or otherwise of section 36 is not the issue. However, as already stated, an appreciation of the position taken in **Ponoo** will provide useful inspiration and guidance in determining the appeal before us.*

[13] As already stated, in this case there were three different cases filed against the Appellant. Therefore, in terms of the above proviso it would not have been unlawful to make an order for the sentences to run concurrently as the sentences were in respect of an offence under Chapter xxvi and xxix of the Penal Code.

[14] The case of **Lenclume v R** [2015] SCCA 11 appears to be on all fours with the present case. In that case, the Appellant had been convicted on his own plea of guilty to both charges levelled against him. The Magistrates' Court sentenced him to imprisonment for twenty years and nine months. On appeal, the Supreme Court sentenced him to 10 years imprisonment. On a further appeal to this Court it was stated:-

*We are of the view that the imprisonment of 10 years imposed on the Appellant who was 18 years old and a first time offender,*

*in respect of case numbered 527/12 for burglary and theft of mainly food items valued at SR320/- was grossly disproportionate to what would have been appropriate. We, accordingly, quash the sentence of 10 years imprisonment imposed on the Appellant and substitute thereof a sentence of 5 years. We are also of the view that the imprisonment of 8 years imprisonment in respect of case numbered 528/12 for housebreaking and theft of items valued at SR9082/- was illegal and grossly disproportionate to what would have been appropriate. We accordingly, quash the sentence of 8 years imprisonment imposed on the Appellant and substitute thereof a sentence of 3 years. We are also of the view that the order made for the sentences of imprisonment of 10 years and 8 years to be executed consecutively on the Appellant who was 18 years old and a first time offender is grossly disproportionate to what would have been appropriate and tantamount to cruel and inhuman punishment in the circumstances. The sentence of 18 years imprisonment, in our view is so excessive as to outrage standards of decency. We order that the sentences of 5 years and 3 years imprisonment to run concurrently. The period which the person has spent in custody in respect of the offences shall count towards sentence.*

- [15] Applying section 36 (supra), the cases of **Vinda**, **Onezime** and **Lenclume** to the facts of this case we think there is justification for interfering with the sentence(s) meted on the Appellant. We note that he readily pleaded guilty to show how remorseful he was. He is not a relatively young man because



he is around 37 years of age or thereabout. At that age we do not think he and the society at large are likely to benefit by keeping him in prison over a long period of time. Since one of the purposes of punishment is reformative we do not think that in the circumstances of this case the long sentence imposed on him by the Supreme Court will serve the desired purpose. We also note that under section 30A of the Penal Code the court ought to have made an order for compensation to the owner of the stolen property but no such order was forthcoming presumably because the owner was able to recover most of the goods stolen from her. Thus, the Appellant did not benefit from the proceeds of crime because most of the stolen items were recovered. Finally, it is evident from the record of the Magistrates' Court that he was in remand custody for a fairly long period of time (about one year) before he was sentenced. He was remanded from 23<sup>rd</sup> November 2010 to 25<sup>th</sup> October 2011.

[16] When all the above factors are taken into consideration coupled with the spirit behind this Court's decision in **Ponoo** (supra) on proportionality and individualization of sentence we allow the appeal to the extent that we reduce the sentence to 8 (eight) years imprisonment with a further order for the period spent in custody to count towards sentence.

J. Msoffe (J.A)

**I concur:.** .....

S. Domah (J.A)

**I concur:.** .....

A.Fernando (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 09 December 2016