IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA) ,A.Fernando (J.A) ,M. Twomey (J.A)**]**

Criminal Appeal SCA 15 & 16/2015

(Appeal from Supreme Court Decision Criminal Appeals 40 & 39/2012)

Isaac Bacco	1st Appellant
Dario Delcy	2nd Appellant

Versus

The Republic	Respondents

Heard: 31 July 2017

Counsel: Ms. Vanessa Gill, with Mr. Bernard Georges for the 1st Appellant

Mr. Nichol Gabriel for the 2nd Appellant

Mr. George Thachett for the Respondent

Delivered: 11 August 2017

JUDGMENT

F. MacGregor (PCA)

[1] This is a case of housebreaking and stealing by the two Appellants, both appeal on sentence only with the 1st and 2nd Appellants sharing the same ground of appeal in that the learned Magistrate surpassed his power of sentencing.

[2] A second ground of appeal only for the 2nd Appellant is to the effect that the sentence is manifestly harsh and excessive.

[3] Both Appellant's grounds of appeal are as follows:

(I) "The sentence of Learned Mr. Magistrate K Labonte on the 18th day of September 2012 which was upheld by the learned Mr. Justice J. Dodin

for 8 years imprisonment for the count of housebreaking and 1 year for the count stealing from a dwelling house to run consecutively was wrong in law as the Learned Magistrate had exceeded the limit of his jurisdiction in respect of his sentencing powers.**"**

The 2nd Appellant:

(II) "The sentence imposed by the learned trial Judge is manifestly harsh, excessive and wrong in law.**"**

[4] Before going to the grounds of appeal two preliminary objections was raised by the Respondent submitting that the appeal should be dismissed due to no question of law being raised by the Appellants in the Notice of Appeal.

[5] To this we find the 1st Appellant has curtly replied to this positively in his Heads of Argument dated 30th June 2017, from paragraph 6(a) to (h), as follows:-

"<u>Preliminary Objections</u>

The Respondent submits that the appeal should be dismissed due to no question of law being raised by the Appellant in the Notice of Appeal.

a. It is submitted that as the Notice of Appeal raises an issue of the sentencing powers of the Learned Magistrate at first instance. This is a question of law on the basis of S.309 (1) of the Criminal Procedure Code.

b. Section 309 (1) of the Criminal Procedure Code stipulates *"No appeal shall be allowed in the case of any accused person, who has pleaded guilty and has been convicted on such plea by the Magistrates' Court, except as to the extent or legality of the sentence."*

c. Dodin J failed to appreciate this issue of the legality of the sentence passed on the appellant and instead focused on the

mandatory minimum sentence imposed for Count 1, (i.e. housebreaking) and failed to take into consideration Count 2, (i.e. stealing from a dwelling house) in which the Appellant was sentenced to 1 year imprisonment.

d. Further, it is submitted that the appeal on sentence is an appeal on a question of law, in terms of s.326(1) of the Criminal Procedure Code: *"Any party to an appeal from the Magistrates' Court may appeal against the decision of the Supreme Court in its appellate jurisdiction to the Court of Appeal* ***on a matter of law*** *but not on a matter of fact or mixed law or on severity of sentence."*

e. In ***Roddy Lenclume v The Republic SCA 32/2013***, Pp. 6, A Fernando (J.A) stated that s. 326(1) of the Criminal Procedure Code cannot be read without reference to Article 120(1) and Article 120(2) of the Constitution. Article 120(1) of the Constitution provides the 'general jurisdiction' of the Court of Appeal to hear and determine appeals of the Supreme Court whilst Article 120(2) of the Constitution provides a 'general right' of appeal from a *'judgment, direction, decision, declaration, decree, writ or order of the Supreme Court.'*

f. It was further stipulated by A Fernando (J.A) that *"We hold that section 236(1) cannot be interpreted as a provision which excludes a right of appeal to the Court of Appeal, against the decision of the Supreme Court in its appellate jurisdiction on an appeal from the Magistrates' Court against sentence."*

g. This was further reiterated in the case of ***Danny Labrosse v The Republic SCA 33/2013.***

h. Hence, it is submitted that at a preliminary stage, the Appellant is within his rights to appeal against sentence to the Seychelles Court of Appeal, even after an appeal to the Supreme Court.**"**

[6] The Respondent also raised another objection, that the Notice is not in conformity with Rule 18(3) & (7) of the Seychelles Court of Appeal Rules. To this the 1st Appellant submitted that in the Notice of Appeal, a ground challenges the relief sought from the judgment from the Supreme Court i.e. that the sentences passed run concurrently and not consecutively. This is in accordance with Rule 18(3) of the Seychelles Court of Appeal Rules. The Appellant has also complied with Rule 18(7) of the Seychelles Court of Appeal Rules in ensuring that the ground of appeal was clear and precise and not vague.

We concur with the 1st Appellant's submissions.

[7] Now to the first ground of appeal also adopted by the 2nd Appellant in which it is submitted as follows:-

Sentencing Powers of the Learned Magistrate

[8] It is submitted that the sentence imposed by Learned Magistrate K Labonte and upheld by Dodin J of 8 years imprisonment for the count of housebreaking and 1 year for the count stealing from a dwelling house to run consecutively was wrong in law. This is because the Learned Magistrate had exceeded the limits of his sentencing powers.

[9] At the time that the case was before the Magistrates Court in September 2012, s. 6 (2) of the Criminal Procedure Code stipulated that *"The Magistrates' Court when presided over by a Magistrate other than a Senior Magistrate may pass any sentence authorized by law: Provided that such sentence shall not exceed, in the case of imprisonment 8 y ears, and in the case of a fine Rs15,000."*

[10] Magistrate K. Labonte was not a senior magistrate at the time the case was before him and hence, he was restricted to passing an 8 year sentence rather than a 9 year sentence for both offences.

[11] Furthermore, in view of the fact that s. 289 of the Penal Code provides a mandatory term of 10 years imprisonment for burglary and s. 9 of the Criminal Procedure Code stipulates that sentences for several offences in one trial should run consecutively and not concurrently, it is submitted that the Magistrate could not have passed the sentences that would go beyond his sentencing powers under s. 6(2) of the Criminal Procedure Code.

[12] Magistrate Labonte failed to appreciate that sentencing the Appellant to a total of 9 years for both offences was not within his power. Dodin J failed to appreciate this and take into account s. 9(1) of the Criminal Procedure Code which stipulates *"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 therefore which such court is competent to impose.."* Had Magistrate Labonte committed the Appellant to the Supreme Court for sentencing, then the 9 year sentence imposed would have been correct in law.

[13] The Respondent argues against this limitation by quoting the following sections of the Criminal Procedure Code:

"Section 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 therefore which such court is competent to impose.

Section 8(2) –

In determining the extent of the court's jurisdiction under section 6 to pass a sentence of imprisonment the court shall be deemed to have jurisdiction to pass a full sentence of imprisonment provided in that section in addition to any term of imprisonment which may be awarded in default of payment of fine or cost or compensation."

[14] Having heard both arguments we find that s. 6(2) of the Code applies and consequently the learned Magistrate could not have passed consecutive sentences that totalled 9 years.

[15] Accordingly we reduce the sentences passed which shall be served concurrently served.

2nd Appellants' second ground of Appeal

[16] The 2nd Appellant submits that the sentence imposed by the learned trial Judge was manifestly harsh and excessive and wrong in law. On the 18th day of September 2012 the Learned Magistrate imposed a sentence of eight years on count 1 and 1 year on count 2 against the 2nd Appellant making a total of nine years imprisonment. Further the learned Magistrate ordered that this nine year sentence was made to run consecutive to all sentences being served by the 2nd Appellant.

Exhibit E of the proceedings states: *"I order that the sentences are to run consecutively. In respect of 1st and 2nd accused, this sentence shall start to run after the expiration of all the sentences that have been passed on them prior to this one"*.

[17] Based on the principle of totality of sentences, it was submitted that the sentence of eight years imposed in the present case being made to run concurrently with the sentence the accused was already serving was manifestly harsh in all circumstances of the case.

[18] The Courts in this jurisdiction have a duty to impose sentences that are proportional to the offences committed. Courts have applied the provision of **Ponoo versus the Attorney General, [2011] SLR 423, Lenclume versus the Republic**, **SCA 32/2013**, **Onezime versus the Republic, SCA 6/2013**, Mervin **Rath versus the Republic, SCA 26/2014**. Indeed when the 2nd Appellant was sentenced in 2012 most of the above cases had not been determined yet. It is very common for Courts to depart from minimum mandatory sentences and in line with the provision of **Ponoo** almost every case where a mandatory sentence is prescribed that sentence has not been imposed. In the case of **Roddy Lenclume versus the Republic SCA 32 of 2012** the Court of Appeal made an important finding in regards to proportionality of sentences in stating:-

"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 SR 320/- 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 SR 9082/- 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."

I submit that the Appellant's sentence was manifestly harsh and excessive and wrong in law. This sentence must therefore be quashed accordingly.

[19] As to the 2nd Appellant's second ground of appeal on the harshness of sentence, it was submitted: he was also serving two other sentences totalling twenty- eight years imprisonment. When the present offence was committed the Appellant was eighteen years and when he was convicted and sentenced nineteen years of age. On the principle of Lenclume (supra) it was submitted that the principle of proportionality of sentence be seriously considered along with the fact that the Appellant was already serving another period of imprisonment. The court was also asked to bear in mind his young age.

[20] Even though section 36 of the Penal Code provides for consecutive sentences by providing that subsequent convictions shall be executed after the expiration of the former sentence, we are of the view that in this case, for an Appellant aged 19, a totality of 28 years imprisonment is grossly disproportionate.

[21] We also note the following:-

a) If when the present offence here occurred the Appellant was 18, then the other two offences in which sentence totalling 20 years are being served must have been committed at a much younger age.

b) At the present rate and count of sentences which come to a total of 28 years, when he has served all his sentences he would have spent most of his life.

c) He would have known of no other life than that before he was 18.

d) We are not of the view that such a long sentence in those circumstances will serve a purpose.

[22] It is unfortunate that the previous sentence of 20 years imposed on the 2nd Appellant is not before us. It came to our attention only in passing. We do however, take cognisance of it and as a result, we recommend the present substituted sentence of 8 years be made to run concurrent with the previous sentences.

[23] We also recommend that the Prison Authorities provide a suitable rehabilitation programme for the 2nd Appellant whilst serving his other sentences.

[24] The appeals are accordingly allowed on the first ground, namely that on counts 1 and 2 the sentences are to run concurrently.

On ground 2 the appeal is partly allowed to the extent that the current sentence is made to run concurrently to the previous sentence being served.

[25] As to the remaining sentences to be served by the 2nd Appellant, he may consider with time an application for clemency with conditions of probation and/or rehabilitation.

F. MacGregor (PCA)

I concur:. **…….** A.Fernando (J.A)

I concur:. **…….** M. Twomey (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 11 August 2017