

**IN THE SEYCHELLES COURT OF APPEAL**

**[Coram: F. MacGregor (PCA), J. Msoffe (J.A), B. Renaud (J.A)]**

**Criminal Appeal SCA 17/2015**

**(Appeal from Supreme Court Decision Criminal Appeal 57/2013)**

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Gerard Volcy

Appellant

Versu  
s

The Republic

Respondent

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Heard: 31 July 2017

Counsel: Mr. Joel Camille for the Appellant

Ms. Brigitte Confait for the Respondent

Delivered: 11 August 2017

**JUDGMENT**

J. Msoffe (J.A)

**INTRODUCTION**

[1] On 10<sup>th</sup> June 2013, following a plea of guilty in criminal case No. 739 of 2012 of the Magistrates' Court, the Appellant was sentenced to terms of imprisonment for 12 years and 4 years, respectively, upon conviction for the offences of Housebreaking and Stealing contrary to sections 289(a) and 260, respectively, of the Penal Code (Cap 158). In imposing the sentences Mrs. Samia Govinden, Senior Magistrate (as she then was), further ordered that:-

*All sentences shall run consecutive to one another and consecutive with any other sentence convict is currently serving and time spent on remand shall be deduced towards sentence.*

- [2] Since the Appellant had convictions in other previous cases the ultimate effect of the above order was that he was to serve a total of 42 years in prison.
- [3] Aggrieved, the Appellant appealed to the Supreme Court where Burhan, J. cited sections 6(2) and 9(1) of the Criminal Procedure Code; this Court's decision in **Roddy Lenclume v Republic** SLA 32/2013 (which was decided after the amendment of section 36 of the Penal Code by Act No. 20 of 2010); and henceforth reduced the term of 42 years imprisonment to one of a total term of 21 years imprisonment. It is instructive to observe here in passing that, although the record does not specifically state so, it is reasonable and quite in order to assume that in reducing the sentence the Judge must have also been heavily influenced by the well thought out and reasoned written submission made by Miss Brigitte Confait, learned State Counsel, dated 3<sup>rd</sup> June 2014 in which she strongly argued in favour of a reduction of the sentence of 42 years imprisonment.
- [4] Anyhow, the Appellant is still aggrieved, hence this second appeal against sentence. The bottom line in this appeal is that, according to the Appellant, the sentence of 21 years imprisonment is still manifestly harsh, excessive and wrong in law.

### **PRELIMINARY OBJECTION**

- [5] Before proceeding to the merits or otherwise of the appeal Counsel for the Respondent Republic raised a preliminary objection based on two points of law:- That, the Appellant has no right of appeal and that, the appeal is barred by prescription.
- [6] Counsel for the Respondent submitted that Section 326 (1) of the Seychelles Code of Criminal Procedure bars the Appellant from exercising his right of appeal on a matter of sentencing to this Court. The sub-section provides:-

326 (1) –

*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 fact and law **or on severity of sentence.***

*For the purposes of this section the expression “decision of the Supreme Court in its appellate jurisdiction” shall include a decision of that court made in revision or on case stated.*

[Emphasis added.]

[7] A reading of the above provision clearly indicates that an appeal originating from the Magistrates’ Court to the Court of Appeal is restricted to matters of law only and cannot be against the severity of sentence as is the case in the present matter. However, we need to address this point further as shall be demonstrated hereunder.

[8] Article 19(11) of the Constitution states:-

*Every person convicted of an offence shall be entitled to appeal in accordance with law against the conviction, sentence and any other order made on the conviction.*

[9] Article 120(2) states:

*Except as this Constitution or an Act otherwise provides, there shall be a right of appeal to the Court of Appeal from a judgment, direction, decision, declaration, decree, writ or order of the Supreme Court.*

[10] As was observed in the case of **Roddy Lenclume v The Republic** Criminal Appeal SCA 32/2013, the following view was adopted:-

*That section 326(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, where the sentence that has been imposed on the basis of mandatory and consecutive norms offended the rule of proportionality. This in our view was a pure question of law and did not fall within the restriction to the general right of appeal provided for in Article 120 (2) and 19(11) of the Constitution.*

[11] In the case of **Danny Labrosse v The Republic** Criminal Appeal SCA 33/2013, in reiterating the same point Fernando J.A had this to say at page 2 of his Judgment:-

*It is only when a matter of fact or mixed fact and law or the severity of a sentence can be viewed as ‘a pure question of law’ that a right of appeal exists to the Court of Appeal, in addition to an appeal on matters of law.*

[12] Further, this Court also addressed the import of Section 326(1) (*supra*) in the case of **Esparon and Others v Republic** where the majority Judgment held that this Court can effectively hear any decisions of the Supreme Court on an appeal from that decision. The Court stated:-

*From the moment, the Supreme Court takes a decision one way or the other, it is appealable as a final decision in its own right to the Court of Appeal.*

[13] As already alluded to, Counsel for the Respondent also raised a second preliminary objection on the ground of prescription. The contention here was that the Appellant did not abide by Rule 18(1) of the Seychelles Court of Appeal Rules. However, a careful perusal of the documents before us shows that the Appellant had sought leave of the Court for leave to appeal out of time and the application to that effect was granted.

[14] In this regard, the preliminary objection based on the above two limbs, as it were, fails and it is accordingly dismissed.

#### **THE LAW [BOTH STATUTE AND CASE LAW]**

[15] Coming back to the merits or otherwise of the appeal it is instructive to state the obtaining law governing the subject.

Section 36 of the Penal Code, as amended, provides:-

*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:*

*Provided that 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 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.*

[16] Section 9(1) of the Criminal Procedure Code provides:-

*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, 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.”*

[17] In the case of **PONOO VS AG SCA (2011) SLR 423** in deciding on proportionality of sentencing this Court reviewed the law on mandatory minimum sentences and held, *inter alia*, that the courts are not bound to apply the provisions of minimum sentence in every case but that they have the discretion to impose or not to impose such minimum mandatory sentences, and that each case should be decided on its own merits. Further, this Court laid down three tests whereby the court can dispense with a minimum mandatory sentence:-

- (a) Where the minimum mandatory sentence would degrade or is inhuman, or cruel to the appellant (see Article 16 of the Constitution).
- (b) Where the trial court acted in a belief that he/she was bound by the law to impose the minimum sentence (see Article 119 (2) of the Constitution).
- (c) The need to ensure a fair hearing by an independent and impartial court under Article 19 (1) of the Constitution (under which the court has to take into account

mitigating factors of an individual offender), along with the principles of proportionality of the sentence.

[18] Also, in construing the import and sense of section 36 (*supra*) in the case of **Neddy Onezime v R, SCA No.6 of 2013** this Court stated:-

*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.*

*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.*

[19] From the sections alluded to above, it is clear that the court below had the powers to order the sentences to run consecutively. However, the question that still remains, is whether or not the sentence of 21 years imprisonment is proportionate to the crimes committed by the Appellant.

[20] In the case of **Roddy Lenclume v R [2015] SCCA 11**, 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 reduced the sentence to 10 years imprisonment. On a further appeal to this Court it was held as follows:-

*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.*

[21] Further at paragraph 19 of the said judgment it was held:

*“We do not venture out to say that the mandatory jail term of 10 years for burglary or the application of consecutive sentences in respect of offences under Chapters XXVI, XXVIII or XXIX are by themselves unconstitutional or offend the principle of proportionality in sentencing. The imposition of such sentences may be appropriate in certain cases of aggravated burglary and the concerns of the legislature will be met by such imposition”*

[22] In **R v White [2002] WASCA 112 as applied in Folette v R (2013) SLR 237**, it was held:-

*There is no hard and fast rule. In the end a judgment must be made to balance the principle that one transaction generally attracts concurrent sentences with the principle that the overall conduct must be appropriately recognised and that distinct acts may in the circumstances attract distinct penalties. Proper weight must therefore be given to the exercise of the sentencing Judges’ discretion”*

[23] In the case of *Godfrey Mathiot v The Republic Cr. Appeal No 9/1993*, Adam JA, delivering the unanimous judgment, held that-

*...the proper approach for an appellate court in sentence appeals is only to intervene where (a) the sentence was wrong in principle;(b) the sentence was either harsh, oppressive or manifestly excessive; (c) the sentence was so far outside the normal discretionary limits; (d) some matter has been improperly taken into consideration or failed to take into consideration something which should have been;(e) the sentence was not justified in law.”*

[24] In *Marcel Damien Quatre v The Republic [2014] SCSC*, it was held at paragraph [18] of the judgment that:-

“Before a court imposes a sentence to a convicted accused person, it considers, amongst other things, the following:

- a) The nature of the offence
- b) The circumstances of the commission of the offence
- c) The personality of the accused person
- d) The age of the accused person**
- e) The value of the property stolen**
- f) The prevalence of the similar cases in the area
- g) The previous record if any of the accused
- h) The interest of the public in protecting it from such crimes.

[Emphasis added.]

[25] In a similar vein, in the case of *Simon v R (1980) SCAR 557*, a guideline was set as to what factors the court needs to take on board before assessing whether a sentence is manifestly excessive. These are -

- a) Plea of guilty**
- b) Previous conviction
- c) Position of trust held by the offender
- d) Trivial nature of property stolen**
- e) Effect of sentence on career and pension rights of offender
- f) Consistency of sentence of one offender with another offender for the same offence

g) Complacent attitude from higher authority.

[Emphasis added.]

[26] At Paragraph [9] of the Judgment in **Francis Crispin v The Republic SCA 16/2013**, this very Court held the following:-

*“The guiding principles in sentencing are summed up in four words: retribution, deterrence, prevention and rehabilitation.”*

[27] In the case of **Mervin Rath v R SCA 26/2014**, at paragraph 15, this Court had the following to say:

*“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.”*

## DISCUSSION

[28] In applying both statute and case law to the facts of this case it is pertinent to make the following observations.

[29] **One**, at the time of conviction on 7<sup>th</sup> June 2013 the Appellant was 35 years old. This means that he is now aged 39 or thereabout. At this age he is still a person of middle age who unfortunately has the propensity of breaking and stealing in people’s houses. Indeed, his record of previous convictions dates back to 2008. Before he was charged in 2013 he had just been released from prison. According to the available record, it was on the 30<sup>th</sup> day of April 2012 that he had been released from prison and soon thereafter, in the months of October and November, he committed the offence(s) the subject of this appeal. With this sort of behaviour it seems the Appellant has never been remorseful for his criminal record. However, we can only speculate that if he is given a good chance to rehabilitate **probably** he will reform himself and become a good citizen after serving

sentence. After all, as per this Court's decision in **Crispin** (*supra*) one of the principles governing sentencing is rehabilitation. In **vocabulary.com** rehabilitation is defined as “*the act of restoring something to its original state .... or to learn to live without drugs or other addictive substances or behaviours.*” And in **Collins Compact Edition** 21<sup>st</sup> Century the word is defined as, *inter alia*, “*help (a person) to readapt to society after illness or imprisonment.*”

[30] We trust and hope that by the time the Appellant finishes the sentence which we will specify hereunder he will probably have been rehabilitated and thereby be able to live a normal and useful life in the society.

[31] **Two**, inspite of our observation in point **one** (above), the question that still lingers in our minds is whether or not the sentence of 21 years imprisonment is in the best interests of justice in the particular circumstances of this case.

[32] **Three**, as observed in **Mervin Rath, Simon, and Marcel Damien Quatre** (*supra*) in passing sentence courts may also consider the value of the property stolen. In the instant case the stolen items were worth Rs.29,265.

[33] **Four**, at the hearing of the appeal we were told that the Appellant suffers from a heart condition. Indeed, this point was raised rather casually at the mitigation stage during trial. However, it was not pursued and given the attention it deserved. In this regard, we ordered, and we were accordingly availed with, a medical report. The Report dated 27<sup>th</sup> June 2017, sent to us vide letter dated 3<sup>rd</sup> July 2017 shows, *inter alia*, that the Appellant “*had history of congenital heart disease, repair of coarctation of aorta done in 1982; he has been following for Asymptomatic Aorta arch aneurysum.*” We, therefore, take this to be his current health condition in so far as his heart is concerned.

[34] Ultimately, considering the cumulative effect of points **one, two, three** and **four** above, we are of the settled view that there is need to revisit the custodial sentence of 21 years imprisonment the Appellant is currently serving. We will do so in the manner we will demonstrate hereunder. We are of the considered opinion that in the circumstances of this case the sentence is on the high side. We do not think that the sentence squarely meets the rehabilitory aspect of sentencing which, as already stated, is one of the principles laid out in the case of **Francis Crispin** (*supra*). At his current age and state of health we do not think that the long sentence of 21 years imprisonment will serve any

useful purpose. We think it will be in the best interests of justice that we impose a shorter sentence in the hope that, or the effect of which will be that, upon completion of the sentence the Appellant will still be in good body strength and health to contribute to his own well being and that of the nation at large. The shorter sentence will also mean that he will have a fairly longer period of time to live and enjoy a normal life for the remaining part of his life than would be the case if he were to be confined to prison for the 21 years imposed on him.

### COMPENSATION

[35] This brings us to another aspect of the case in relation to compensation. We think this is a novel point which has to be addressed for purposes of a fair decision in this matter.

[36] Rule 31(5) of the Court of Appeal Rules reads:-

*In its judgment, the Court may confirm, reverse or vary the decision of the trial court with or without an order as to costs, or may order a re-trial or may remit the matter with the opinion of the Court thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by such order exercise any power which the trial court might have exercised.*

*Provided that the Court may, notwithstanding that it is of opinion that the point or points raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.*

[Emphasis added.]

[37] For the purposes of our decision in this appeal we wish to read the above sub-rule together with the provisions of section 30A(1) of the Penal Code which provides:-

*Notwithstanding section 30 and any other written law to the contrary, where a person is convicted of an offence under Chapter XXVI, Chapter XXVIII or Chapter XXIX the court shall, in addition to the sentence prescribed for the offence, order the person to compensate the owner or property who has been deprived of the property as a result of the commission of that offence.*

[38] In the light of **Rule 31(5)** and section **30A(1)** (*supra*), we are satisfied that this is a fit case for making an order for compensation in the manner we will state and order

hereunder. By doing so, we hope, the complainant will also appreciate that justice has not only been done but has manifestly been seen to be done. Also, see Lord Heward in **Rep v Sussex Justices, Ex parte McCarthy** (1924) 1 KB 256 at page 259. This is also important because it will send a message to intending thieves that one cannot steal and get away with it lightly.

#### CONCLUSION

[39] In the end result, for the foregoing reasons, we partly allow the appeal and henceforth make the following orders:-

- (i) We hereby set aside the sentence of 21 years imprisonment and substitute thereof a sentence of 10 years imprisonment. As already ordered by the courts below, the time spent in remand custody to count towards sentence.
- (ii) In the spirit of **Rule 31(5)** and **Section 30(A)(1)** (*supra*) we hereby order the Appellant to compensate the owner the stolen items subject of this appeal. The compensation should be in kind or in monetary terms for an amount of not less than Rs.29,265.

J. Msoffe (J.A)

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

F. MacGregor (PCA)

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

B. Renaud (J.A)

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