

**Alcindor v Republic
(2007) SLR 32**

Wilby LUCAS for the appellant
David ESPARON for the respondent

Judgment delivered on 24 September 2007 by:

PERERA J: This is an appeal against sentence.

The appellant was charged before the Magistrates' Court in two separate cases, as follows-

(1) Case No 595/04

Count 1 - Robbery contrary to section 280 and 281 of the Penal Code.

Particulars of the offence

Brian Alcindor of Cascade, Mahe, during the day of 24 May 2004, at Anse Gaulette, Mahe, robbed Mr Berno Schwenic and wife Anne-Marie Landmann of R2000 in Seychelles currency, 1 note of 100 euro, a nokia mobile phone with charger, jewellery including rings and necklaces, at their residence, namely room 2 of "Lazare Picault" Guest House.

Count 2

Assault with intent to steal contrary to section 283 of the Penal Code.

Particulars of the Offence

Brian Alcindor of Cascade, Mahe on 24 May 2004 at "Lazare Picault" Guest House, Anse Gaulette, Mahe, after committing robbery in room 2, as particularised above, assaulted Gilbert Quatre with a dagger with intent to steal the stolen items.

Count 3

Receiving stolen property contrary to section 309(1) of the Penal Code.

Particulars of the Offence

Brian Alcindor, on a day unknown between 24 and 26 May 2007, did receive 3 gold rings and 1 gold necklace, 1 charger for a mobile, knowing or having reason to believe the same to have been stolen or unlawfully obtained.

(2) Case No 596/04

The appellant was charged with two counts of housebreaking and stealing from a dwelling house. It was alleged that the said offences were committed by the

appellant in the course of the same transaction on 24 May 2004 at the "Lazare Picault" Guest House, after entering room no 8 occupied by Mr Jurgen Bischoff and Krishtina Marquardt. It was particularised in the charges that the appellant stole local and foreign currency, a mobile phone, 1 CD Player and 20 CDs, a watch, a camera and a pair of sunglasses.

In case no 595/04, the accused pleaded guilty to the charge of receiving stolen property under count 3, and consequently, the prosecution withdrew counts 1 and 2. The Senior Magistrate (Mr V Ramdonee) convicted the accused for the offence of receiving stolen property and imposed a sentence of 4 years imprisonment, although section 309 prescribed a possible sentence up to 14 years.

In case no 596/04, the accused pleaded guilty to the offence of receiving stolen property under count 2. Consequently, the prosecution withdrew the charge of housebreaking under count 1. The Senior Magistrate, after recording a conviction under count 2, imposed a sentence of 4 years, to run consecutively to the sentence of 4 years imposed in case no 595/04.

The appeal against sentence is based on the ground that the sentence, which when taken consecutively would be for 8 years, is harsh and excessive as the prosecution withdrew the charges of robbery, housebreaking and assault, and accepted the guilty plea on the count of receiving stolen property in both cases. Mr Wilby Lucas, counsel for the Appellant submitted that only a few items, such as 1 necklace, 2 mobile phones, a charger and a lamp were found on the appellant, and that hence, in these circumstances, the sentences should have been ordered to run concurrently.

Mr. Esparon, Senior State Counsel, submitted that, admittedly, the items were stolen from German tourists. He also submitted that the Senior Magistrate had the record of previous convictions of the appellant at the time of sentencing, and hence, in these circumstances, the discretion exercised by him under section 36 of the Penal Code to order consecutive sentences cannot be faulted.

According to the proceedings recorded in case no 595/04, the appellant denied that he committed robbery or that he was present at the alleged place of the robbery. In case no 596/04, he denied breaking into the building and stated that he had made a statement to the police giving the name of the person who broke in. He only pleaded guilty to receiving some of the items stolen. It was in these circumstances that the prosecution withdrew the charges in respect of those offences, and accepted the guilty plea in both cases for receiving stolen property. In these circumstances, should the offences be considered as one incident or transaction or different transactions for purposes of punishment, as the items found in the possession of the appellant were those of both sets of complainants in two cases. In the case of *Rene Laporte v R* (unreported) SCA 1/1980, the Court of Appeal stated -

On the issue of consecutive sentences, main reliance was placed on the principle, again stated in *Thomas on Sentencing* 47 and 48, that sentences

imposed for what is essentially one incident or transaction should run concurrently and that, in determining whether offences are part of one incident or transaction, the Courts take a broad view.

This argument gains impetus from the apparent inequity of treating the incident, for the purpose of inferring guilt on the damages charged, and then as distinct and separate, for the purpose of punishment.

In the case *John Vinda v R* (unreported) SCA the appellant was charged before the Magistrates' Court with several offences of housebreaking and stealing. The charges were filed in three different cases, as different complainants were involved. He was sentenced to terms totaling 7 years, but as they were ordered to run concurrently, he would in effect serve only two years. The Attorney-General sought revision of the sentences. The Supreme Court reversed the order for concurrent execution and ordered that the convict would serve a total of 5 years and 3 months instead of 2 years. In doing so, the Supreme Court took into consideration that the offences were serious, and that the maximum sentences prescribed were 7 years for housebreaking and 5 years for stealing. Further, it was considered that although the offences were committed by the appellant within a radius of 2 miles from one another, they were committed on separate days and occasions. Upon an appeal being filed before the Court of Appeal, the variation of sentence was maintained. The Court held that under section 36 of the Penal Code, consecutive execution of sentences was the rule and concurrent execution was the exception. That Court, observed that the Magistrate had applied the principle of totality of sentence on humanitarian grounds, and that that was not a valid reason to exercise the discretion when imposing a concurrent sentence. The Court of Appeal (Ayoola JA) stated -

...where a directive which is the exception is made by the Trial Court, the factors and special circumstances for such directive should be manifest from the order or demonstrated by the Trial Court in its Ruling. One such circumstance which may justify the application of the exception would be the disproportionality of consecutive sentences to the totality of the behaviour of the convicted person or the gravity of the offence.

In the present case, the Senior Magistrate in sentencing the appellant in Crim Case 596/04 stated thus -

This Court has considered all the relevant circumstances of this case including what accused has stated in mitigation. The Court takes a serious view with regard to the present charge in as much as the offence is connected with dishonesty. After doing so, I accordingly sentence the Accused to undergo a term of four years imprisonment. This prison term is take effect after the prison term in case no 595/04.

It has to be considered that the appellant was convicted upon pleading guilty in both cases, only for the offence of receiving stolen property under count 3. Count 1 for

robbery, and count 2 for assault with intent to steal, were withdrawn by the prosecution. Hence in essence, for the purposes of sentencing, there was only one transaction. The Senior Magistrate should therefore have exercised his discretion to apply the exception and imposed a concurrent sentence in case no 596/2004.

In these circumstances, the Court varies the sentencing order in case no 596/2004 by substituting an order that the sentence of 4 years imprisonment imposed in that case shall run concurrently with the sentence of 4 years imprisonment imposed in case no 595/2004.

The appeal is accordingly allowed.

Record: Court of Appeal (Criminal No 14 of 2006)