

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 26/2014

Appeal from Magistrates Court decision 837/2011

[2014] SCSC

JAMES PAUL

Appellant

versus

THE REPUBLIC

Heard:

Counsel: Mr. Nichol Gabriel Attorney at Law for Appellant

Ms Shannaz Musufer standing in for
Mr. Hemanth Kumar, Assistant Principal State Counsel for the Republic

Delivered:

JUDGMENT

Akiiki-Kiiza J

[1] This is an appeal from the orders of his Worship K. Labonte dated the 5th February 2013 whereby he sentenced the appellant and his co-accused to 10 years imprisonment each.

[2] The appellant raised four grounds in his memorandum of appeal namely:

(a) That the sentence imposed by the Learned Trial Magistrate was manifestly harsh and excessive.

(b) That the sentence of 10 years imposed by the Learned Magistrate was in excess of his jurisdiction.

(c) That the Learned Magistrate failed to consider the mitigating factors put forward by his defence before imposing the sentence of 10 years imprisonment on the appellant.

(d) That the Learned Magistrate failed to consider the facts that the value of the items stolen was minimal and the premises entered were not residential premises. He therefore prayed for the quashing of the sentence imposed by the Learned Trial Magistrate .

[3] The brief facts relevant to this appeal as can be gathered from the lower court's record appeared to be as follows:

The accused was charged and convicted of the offence of breaking and entering into a building and committing a felony therein contrary to section 291(a) and section 23 of the Penal Code Act.

The particulars whereof were that the appellant and his two other colleagues on the 11th day of December 2011 at Serge Monthy's (Pty) Ltd Providence, Mahe, broke and entered a container and stole therein seventy (70) sacks of cement , all amounting to a total value of R1,050, being the property of Serge Monthy. It appears further that the case against the 3rd accused was withdrawn along the way; which left the appellant and one Roy Lozaique.

After a full hearing of the case, the Learned Trial Magistrate found appellant and his colleague guilty as charged and convicted him. He sentenced both of them to 10 years imprisonment; hence this appeal against sentence.

[4] I will follow the order in which Mr Gabriel, the Learned Counsel for the Appellant, has presented his case during his oral submissions.

[5] He appeared to me to have combined the first and second grounds together and argued them concurrently. I will first consider whether or not the Learned Trial Magistrate had jurisdiction to impose a sentence of 10 years imprisonment on the appellant.

- [6] It is Mr Gabriel's submission that the Learned Trial Magistrate lacked such a jurisdiction. This was also not contested by Mr Kumar, Counsel for the Republic. Mr Gabriel cited the provisions of section 6(2) of the Criminal Procedure Code, which limits the sentence which can be imposed by a Magistrate to 8 years and a Senior Magistrate 10 years. This however, was before the recent amendment which increased the term of imprisonment to 18 years in respect of a Magistrate and 25 years in respect of a Senior Magistrate. (see Act 4 of 2014).
- [7] The lower court record indicates that the case against the appellant was committed on the 11th December 2011. This was about 2 to 3 years before Act 4 of 2014 was enacted. Hence, the law applicable and binding on the Trial Magistrate was that prior to the enactment of Act 4 of 2014 and which limits his jurisdiction to a sentence of only 8 years. I am aware that the maximum sentence for the offence of breaking into a building and committing a felony therein is 14 years. Hence on the face of it the Magistrate was within the number of years permitted by Section 291 of the Penal Code Act, but had to act within the parameters allowed him by Section 6(2) of the Criminal Procedure Code. Hence he cannot exercise jurisdiction which he does not have. The second ground of appeal succeeds.
- [8] The next question is what is the fate of the sentence of 10 years he had imposed. The same question appears to have arisen before my Learned Colleague Justice McKee in the case of ***Hendrick Jouaneau vs Republic [2013] scsc 3 (Criminal Appeal no. 38 of 2013)*** where the Learned Judge relied on a House of Lord decision in the case of ***R vs Cain (1985) AC46*** to hold that the orders made in excess of the Courts' powers was not a nullity per se but subsisted till it is set aside by an appellate court. This appears to be because the accused had been properly convicted by a court with competent jurisdiction hence the Magistrate had jurisdiction to try this case but simply exceeded his sentencing powers which does not invalidate the conviction per se. This problem I am sure has been solved now by the enactment of Act 4 of 2014 which has enhanced the sentencing powers of the Magistrates, as I have pointed out earlier on.

[9] The next submission put forward by Mr Gabriel is that the Trial Magistrate never took into consideration certain factors while passing the sentence. This is in his 3rd and 4th grounds of appeal. He listed the failures of the Trial Magistrate as follows:

- (a) That the premises were mere commercial premises as opposed to domestic premises hence the privacy of persons was not invaded.
- (b) That the value of the items stolen was small amounting to R1,050 only.
- (c) That Hon. Justice McKee imposed a sentence of lesser than the minimum authorised by law in the case of *Nathaniel Thelemont* hence the same thing should have been done by the Learned Trial Magistrate.

[10] Usually when the court is imposing a sentence it does not do so arbitrarily or out of emotion. The court follows known and a clear sentencing principles and guidelines. These include the following;

- (a) The gravity of the offence including the degree of culpability of the offender;
- (b) The nature of the offence.
- (c) The need for consistency with appropriate sentencing levels in similar offences committed in similar circumstances.
- (d) Any information provided to the court concerning the effect of the offence on the victim or the community.
- (e) The offender's personal, or family background (this could include antecedents, age, etc)
- (f) Any previous convictions.
- (g) Any other relevant matters which has been brought to the attention of the court which is relevant to the case at hand.

- [11] Once the Trial Court has properly directed its mind to these principles then the appellate court will not normally interfere with the discretion of the Trial Magistrate merely because the appellate court would have decided differently.
- [12] The circumstances under which an appellate court could interfere were put forward by Hon, Justice **MSOFFE, Justice of Appeal in the case of Livette Assary vs Republic, SCA Crim Appeal no. 18 of 2010**, where the Learned Judge stated as follows:-
- (a) The sentence was harsh, oppressive or manifestly excessive;
 - (b) The sentence was wrong in principle.
 - (c) The sentence was far outside the discretionary limits of the Magistrate.
 - (d) A matter had been improperly taken into consideration or a matter that should have been taken into consideration was not; or
 - (e) The sentence was not justified in law.
- [13] The above principles are not cumulative but each one is independent of the other. Once one is breached, then the appellate court will interfere with the discretion of the Trial Magistrate while imposing the sentence.
- [14] In this particular case, the Learned Trial Magistrate had exceeded his jurisdictional powers when he imposed a sentence of 10 years imprisonment instead of the 8 years permitted by section 6(2) of the Criminal Procedure Code. This breached principles 2, 3 and 4 as emanated by the Judge in the **Livette Assary** case above.
- [15] The next question for my consideration is whether the sentence of 10 years imprisonment was harsh, oppressive or manifestly excessive. Clearly the Magistrate exceeded his sentence powers by 2 years; hence in this regard it was excessive. However, in my considered view not harsh or oppressive given his past record. The maximum sentence under Section 291 of the Penal Code Act, is up to a term of 14 years, and similarly the maximum sentence under section 289 of the Penal Code Act is also 14 years imprisonment. It must be also noted that in this particular case it was full trial before the appellant was found guilty and convicted and sentenced. In the premises, the Trial

Magistrate considered the circumstances of the case before sentencing the appellant. The first ground of appeal fails.

- [16] Mr Gabriel also submitted that as the premises broken into were not domestic but commercial; the sentence should have been far less. However, noting that the offences under Section 289 and section 291 of the Penal Code Act both have similar maximum sentence of 14 years, it is my view that it does not matter whether it was a commercial building or a residential building.
- [17] Mr Gabriel during his oral submissions referred me to decision by my Learned Brother Justice McKee, in the case of *Nathaniel Thelermont [2014] at page 152* where the Learned Judge imposed a lesser sentence than the maximum authorised by law. The Learned Judge followed the Court of Appeal in the decision of *Jean Frederick Ponoo vs AG SCA (2011) SLR 423*, where their Lordships reviewed the law on mandatory minimum sentences, and held to the effect that the courts are not bound to apply the provisions of minimum sentence in every case and that the court should consider each case on its own merits and apply the necessary discretion accordingly. In other words they must be exceptional circumstances to warrant the court to go below the minimum sentence imposed by the statute. However, since the *Ponoo case* there has been different applications by the Court of Appeal of the same principle enunciated in that case.
- [18] In the case of *Rep vs Ladouceur (2012) SLR*, sickness and illnesses were held to be such exceptional circumstances warranting application of the *Ponoo* principle and reducing the sentence imposed below the standard minimum but in the case of *Valentin vs Republic (2013) SLR 659*, the fact that the accused was a first offender with a family, had been orphaned at an early age and had had a hard life, were all held by the same court not to amount to special circumstances to warrant departure from imposing a minimum mandatory sentence.
- [19] Hence it appears from the above each case should be decided on its own facts and that is why Hon. Justice McKee decided on the facts before him as he did.

[20] All in all, this appeal succeeds only on the 2nd ground. The 1st, 3rd and 4th grounds are dismissed.

[21] In the premises I quashed the sentence of 10 years imprisonment imposed by the Learned Trial Magistrate and substitute it with 8 years imprisonment he should have imposed.

[22] Order accordingly

D. AKIIKI-KIIZA

JUDGE

Dated this 27th day of June 2014