IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 40/2014

Appeal from Magistrates Court decision 686/2012

[201] SCSC

YANNICK CONSTANT
Appellant

Versus

THE REPUBLIC

Heard: 1 July, 2014

Counsel: Mr Nichol Gabriel for appellant

Mrs Lansinglu Rongmei, Attorney General for the Republic

Delivered: 4, July 2014

JUDGMENT

Akiiki-Kiiza J

[1] This is an appeal arising from the decision of his worship Kisnan Labonte dated the 2nd of April 2013. The learned trial magistrate convicted the appellant on his on own plea of guilty in four different files namely *616/12; 684/12; 685/12 and 686/12*. He sentenced the accused as follows:-

a. In file *616/12;* Retaining Stolen Property C*/S 3091 of the Penal Code Act* 18 months as the 1st count.

b. On Count 2; Obtaining Goods by False Pretences *C/S 297 of the Penal Code Act* to 9 months.

- **c.** Count 3; Uttering a False Document C*/S 339 and 335 of the Penal Code Act* to 1 year. These sentences where to run concurrently which means the total time he will serve in this file is eighteen months (1 ½).

[2] In file no *684/12* the learned Magistrate made the following orders:-

- **a.** On 1st count; Retaining Stolen Property *C/S 309 (1) of the Penal Code Act* 2 years imprisonment
- **b.** On 2nd count; Obtaining Goods by False Pretences *C/S 297 of the Penal Code Act* to 1 year.
- **c.** On 3rd Count; Uttering False Document *C/S 339 and 335 of the Penal Code Act* to a term of 1 ½ years imprisonment.

These sentences also were to run concurrently which means the maximum sentence under this file was 2 years.

[3] In file no *685/2012:-*

- **a.** 1st count; of Retaining Stolen Property *C/S 309 (1) of the Penal Code Act* was sentenced to 3 years imprisonment
- **b.** 2nd count; Attempt to commit a misdemeanour of obtaining goods by false pretences *C/S 378 of the Penal Code Act* was sentence to 9 months imprisonment.
- **c.** 3rd count; Uttering False Document *C/S 339 and 335 of the Penal Code Act* was sentenced to 1 ½ years imprisonment

These sentences were also to run concurrently. Which meant the maximum sentence to be served by appellant was 3 years.

[4] The 4th file 686/12;

a. 1st count; Retaining Stolen Property *C/S 3091 of the Penal Code Act* sentenced him to 3 years imprisonment.

b. 2nd Count; Obtaining Goods by False Pretences *C/S 297 of the Penal Code Act* were sentenced to 1 ½ years imprisonment.

c. 3rd Count; Uttering False Document *C/S 339of the Penal Code Act* was sentence to 1 ½ years imprisonment.

Also these sentences were to run concurrently which means the maximum would be 3 years imprisonment.

[5] The Learned trial Magistrate then ordered that the concurrent sentences in the above four files where to run consecutively. The above order translates into the following sentences:-

a. 1 ½ years 616/12

b. 2 years in file 684/12

c. 3years in file 685/12

d. 3 years in file 686/12

[6] As the learned trial Magistrate ordered these sentences to run consecutively it means the appellant was to serve a total 9 ½ years imprisonment. The appellant being dissatisfied with the above orders he has now appealed to this court against sentence only. He raised the following grounds:-

a. That the sentences imposed by the learned Magistrate where manifestly harsh and excessive and wrong in principle

b. That the total sentence of 13 ½ (9 ½) years imposed by the learned Magistrate would not correspond to the current pattern of sentencing in the case of similar nature.

c. That the learned Magistrate failed to consider the plea of guilty in mitigation by the appellant.

d. That the learned Magistrate failed to apply the principle of totality of sentences.

Wherefore he prayed for the quashing of the sentenced imposed by the trial court.

[7] During oral submission Mr. Gabriel the learned counsel for the appellant gave a spirited submission why this court should and must quash the trial Magistrate sentence.

[8] I will consider these submissions in the order as he made them. For starters, he submitted that the learned trial Magistrate sentenced the appellant to a term of 13 ½ years in the four different files. However upon a careful addition of the maximum sentence in each file, the total term is 9 ½ years not 13 ½ years as submitted by Mr. Gabriel. The total number of years to be served by the appellant as imposed by the trial Magistrate is therefore 9 ½ years and not 13 ½ years.

[9] Mr. Gabriel went further and submitted to the effect that the learned trial Magistrate overlooked the provision of *section 9 (2) of the Criminal Procedure Code* which must be read together with *section 6 (2)* of the same Act in that for the purposes of an appeal the aggregate of the consecutive sentences is to be deemed a single sentence hence in this case by the Magistrate imposing a total of 9 ½ years for four different cases he was exceeding the maximum 8 years imprisonment permitting by *section 6 (2) of the Criminal Procedure Code*. That this therefore was wrong in principle and excessive in nature. He cited the case of **DINGWALL VS R** in support thereof. Mr. Gabriel also alluded to the principle of totality of sentences which he said the trial Magistrate had also breached.

Hence he prayed for the quashing of the consecutive sentencing of 9 ½ years and substitute it with a lesser one.

[10] On the other hand Mrs. Lansinglu, the learned counsel for the Republic was over view, as I understood her, that the trial Magistrate never exceeded his sentencing powers under *section 6 (2) of the Criminal Procedure Code* as the maximum sentence in each file was not beyond 3 years, she invited the court not to interfere with the learned Magistrate sentences, as it was neither excessive nor wrong in principle.

[11] In my considered view the crux of the matter revolves around the interpretation of *Section 6 (2) of the Criminal Procedure Code*, *Section 7 of the same Criminal Procedure Code, Section 9 of the Criminal Procedure Code and Section 36 Penal Code Act. Section 6 of the Criminal Procedure Code* limits the jurisdiction of the Magistrate as in this case to a maximum sentence of 8 years imprisonment (*before Act 4/14 came into force).* This court has held elsewhere that a Magistrate cannot go beyond this limit.

(See the case of ***MARCEL DAMIEN QUATRE V REPUBLIC SCSC CN 10/2014*** *and* ***JAMES PAUL V REPUBLIC SCSC CN NO 26/14)***. The only alternative open to a Magistrate where he feels that in the circumstances pertaining to a case before him an accused person merits a stiffer sentence than that allowed him by the law, he has to resort to *Section 7 of the Criminal Procedure Code* and commit the accused to the Supreme Court for sentencing. *Section 7* provides as under:-

> *"**7 (1)** When a magistrate has convicted a person and he is of opinion that a higher sentence should be passed in respect of the offence then he has power to pass he may commit the offender for sentence to the Supreme Court in accordance with the following provisions of this section"*

[12] This was the only avenue open to the learned Magistrate in this case. He should have committed the appellant to this court for a higher sentence if he felt if that is what he deserved.

[13] It appears that learned Magistrate made the above order for concurrent sentences in the four files to run consecutively under the provisional *section 36 of the Penal Code Act*. This section provides follows:-

> *"Where a person after conviction of 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 and 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 there of."*

There is a proviso thereafter but it is not relevant to this case as the offence with which the appellant was convicted do not fall within *Chapter's XXVX, XXVIII OR XXIX of the Penal Code Act* where by the sentence *must* run consecutively.

[14] The applicability of *section 36 of he Penal Code Act* has been examined by the Court of Appeal in the case of ***JOHN VINDA V R. (1995)*** where it was held that under *Section 36 of the Penal Code* Act consecutive execution of the sentences was the **RULE** and the concurrent execution was the **EXCEPTION**. The trial court in the ***VINDA*** Case cited above had imposed a concurrent sentence of 2 years where the accused had been charged with several house breaking and stealing offences in three different files and different complaints, he should have otherwise been sentenced to a total of 7 years instead of the 2 years imposed by the trial Magistrate. *Ayola JA* had the following to say:

> *" Where a directive (for concurrent sentence) which is the exception (to the consecutive sentence) 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."*

[15] In the instant case the learned trial Magistrate while sentencing the appellant outlined the facts in each of the four files and then had the following to say:

> *"In mitigation counsel for the accused state that the accused that was 24 years old had plead guilty and was remorseful. He has not wasted the courts time over the trial of these cases and should be credited for that. Whilst acknowledging the accused guilty pleas on the 12 counts in the four cases should receive some form of credit, this court takes note that the first count in all four case files carries a penalty of 14 years. Further more in file 616/12, 684/12 and 686/12 the accused has benefited from his criminal actions in that fraudulently obtained goods (were)*

not recovered by the police. Therefore taking into consideration those factors, I sentenced the accused as follows"

There after the learned trial Magistrate had handed down the sentences we have already seen herein above and ordered the sentence in each of the file to run concurrently. He also made a final order whereby the four concurrent sentences were to run consecutively, presumably under *Section 36 of the Penal Code Act.*

[16] The circumstances under which an Appellant Court can interfere with the sentence imposed by trial court are well known. These include where the trial court has acted on a wrong principle or overlooked some material factors or if the sentence was manifestly excessive or harsh. In this case the total sentence imposed by the learned trial Magistrate is 9 ½ years was. It was beyond the maximum sentence of 8 years permitted by *section 6 (2) of the Criminal Procedure Code*. In this regard it was excessive and not supported in law.

[17] As noted above the learned trial Magistrate put into consideration the mitigating factors raised by the defence and the plea of guilty. He also took into account the seriousness of the first count in all the four files which carried a maximum sentence of 14 years.

[18] In my considered view he justified the sentence he had imposed on each file hence. As was held by ***SOUYAVE ACTING CJ in the case of DINGWALL V R (1963-66) 3 SLR 205,*** an appeal court is not empowered to alter a sentence on the mere ground that if it had been trying the case, it might have passed a somewhat different sentence. I am of the same view here as well.

[19] All in all, I find that the first ground of appeal partially succeeds in that the total number 9 years the trial Magistrate imposed was in excess of his jurisdiction. The rest of the grounds raised on appeal fail.

[20] In the premises therefore the appeal succeed in the following terms; the total consecutive sentence of 9 ½ years imposed by the learned trial Magistrate is quashed. It is substituted

by a sentence of 8 years imprisonment as the aggregate total of four files. I order accordingly.

ORDER

As the facts and grounds of the appeal succeeds in this file (*41/13)* are on all fours with that of *CA 40/13*, this judgment is inserted in file *40/13* as the judgment of that file as well.

Signed, dated and delivered at Ile du Port on 4 July, 2014

D.AKIIKI-KIIZA
Judge of the Supreme Court