IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 82/2013

Appeal from Magistrates Court decision 810/2011

[2014] SCSC

CHARIS JEAN-BAPTISTE

Appellant

Versus

THE REPUBLIC

Heard: 25 September 2014

Counsel: Mr. Nichol Gabriel for appellant

Mrs. Langsinglu Rongmei, Attorney General for the Republic

Delivered: 29 September 2014

JUDGMENT

Akiiki-Kiiza J

[1] The appellant was charged with the offence of Robbery *Contra Section 280 of the Penal Code Act* which is also punishable under the same section.

[2] It was alleged that he on the 26th day of November 2011 at Lodge Street, Mahe, robbed one Kamatchi Vinayagamurthy, one gold chain valued at SR 59,000/- being the property of the fore said victim.

[3] The Learned Senior Magistrate convicted him after a full hearing and sentenced him to serve 10 years imprisonment. Having been dissatisfied with the trial courts decision and orders he now appears to this court but only sentence.

[4] The appellant was represented on appeal by Mr. Nichol Gabriel and the Respondent/Republic by Mrs. Lansinglu.

[5] The Memorandum of Appeal comprised of the following grounds:

(a) The sentence imposed by the Learned Magistrate is manifestly harsh and excessive.

(b) The sentence of ten years imposed by the Learned Magistrate was in excess of her jurisdiction.

(c) The learned Magistrate failed to consider concurrent sentencing for the appellant.

[6] At the hearing, Mr. Gabriel abandoned the second ground having realised that the learned trial Magistrate was a Senior Magistrate hence empowered under *Section 6 (1)* of the *Criminal Procedure Code* to impose a maximum sentence of up to10 years.

[7] This case is governed by the law as at 31st July 2011. As the case is alleged to have been committed on the 26/11/2011

[8] I will now consider the other submissions made by Mr. Gabriel regarding the sentence in the order he had raised them. He submitted to the effect that the sentence of 10 years was harsh and excessive in the sense that the trial Magistrate did not apply the principle in **PONOO** case properly and that as the appellant had committed this offence, under *Section 27 (1) (c) (i*) of the *Penal Code Act* the minimums sentence was 10 years only and not 15 years as thought by the trial Magistrate. She therefore never reduced the sentence, especially after taking into consideration the mitigating factors in favour of the appellant. He suggested that a sentenced of 8 years should have been appropriate in the circumstances of this case.

[9] On her part Mrs. Lansinglu, the Learned Counsel for the Respondent/ Republic agreed that the minimum sentence was 10 and not 15 years as held by the trial Magistrate. She was however of a view that the 10 years imprisonment imposed by the trial Magistrate was appropriate in the circumstances.

[10] This offence was committed on the 26th of November 2011. By then the law in force was as of 31st July 2011, *section 27 (1) (c) (i) of the Penal Code Act*, enacts as follows:-

> *"27(1) (c) (i). Not withstanding section 26 and any other written law, a person who is convicted of an offence in chapters XXVIII or Chapter XXIV shall:-*
>
> *(a) ……..*
>
> *(b) ……..*
>
> *(c) Where the offence is punishable with imprisonment for more than ten years or with imprisonment for life:-*
>
> *(i) And if it the first conviction of the person for such offence or a similar offence, be sentence to imprisonment for a period of not less than ten years."*

Act 5/2012, repealed Section 27 (1) and substituted it with a new subsection containing the quoted section above. Hence, there is no *Section 27A* to talk about, as erroneously thought by the trial Magistrate. The new *Section 27 (1)* was not an addition to the old *Section 27 (1),* so as to make the new *27 A*. Once it was repealed then it ceased to exist and was replaced by the new *Section 27 (i) as per Act 5/12*. *Section 27(1) (c) (i)* enhanced the minimum sentence from 10 to 15 years, for a first offender. *Act 5/12,* was passed on the 24th of July 2012 which was after the appellant had already committed the offence on the 26/11/11. Hence it was not applicable to the case at hand. The Learned Trial Senior Magistrate took note of the principles in **PONOO VS AG. SCA (2011) SLR 423** where Court of Appeal reviewed the law on mandatory minimum sentences and held in, *inter alia*, that the courts are not bound to apply the provisions of minimum sentence in every case but that they had the discretion to impose or not to impose such a minimum mandatory sentences, and that each case should be treated on its own merits. Further

their Lordships of the Court of Appeal laid down 3 tests where by the court can dispense with a minimum mandatory sentence:-

> **(a) Where the minimum mandatory sentence would degrade or is in human, 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. (see also the case of DAVID ANDY JEAN BAPTISTE [2014] SCSC, CR CN. 23/14).**

[11] According to the Lower Court Record, The Learned Senior Trial Magistrate erroneously thought the minimum mandatory sentence under *Section 27 (1) (c) (i) of the Penal Code Act* was 15 years whereas it was only 10 years, this means that the application of the principle in **PONOO** case was based on wrong premises leading her to a wrong final sentence. Hence though she had considered the mitigating factors in favour of the accused, she erroneously thought she had reduced the minimum sentence to 10 years from 15 years. This means that, the appellant actually never benefited from the application of **PONOO** principles.

[12] Mr. Gabriel had suggested 8 years to be appropriate. I tend to agree with him, given the maximum sentence in Robbery offence (18 years) and the mandatory minimum sentence is 10 years and taking into consideration of the mitigating factors pointed out by the trial Magistrate in the Ruling on sentence, I quash the sentence of 10 years imposed and substitute with 8 years. The time he spent on remand is to be deducted from his sentence.

[12] As regards to the third ground of appeal on failure of the Learned Trial Magistrate not to consider concurrent sentencing, this does not arise, as this was only one sentence on a single count in the charge sheet. It is only where there are multiple convictions that the question of concurrent or consecutive sentence comes in. Secondly it appears the

appellant was a first offender, hence the question of consecutive sentence under *Section 36 of Penal Code Act* does not arise.

[13] All in all this appeal succeeds in part in that the second ground of appeal succeeds but the first and third grounds had no merit and one dismissed.

Order accordingly.

Signed, dated and delivered at Ile du Port on 29 September 2014

D Akiiki-Kiiza
Judge of the Supreme Court