

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 46/2012 and CN34/2013

Appeal from Magistrates Court decisions 22/2012, 23/2012 and 289/2012.

[2014] SCSC 456

NIGUS SALOMON

AppellantVersus

THE REPUBLIC

Heard: 24 October 2013
Counsel: Mr. Nichol Gabriel for appellant
Mr. Kumar, State Counsel for the Republic
Delivered: 1st December 2014

JUDGMENT

McKee J

- [1] The Appellant lodge Appeals against Sentence in respect of Magistrate Court cases 22/2012 and 23/2012, both in Appeal Court file 46/12 and against conviction and sentence in respect of case 289/12 [Appeal Court file 34/13]. There is reference to a further Magistrate Court file 21/12 but there is no formal appeal lodged by the Appellant in this case. However reference is made to it later in the judgment to show its relationship with case files 22/12 and 23/12.
- [2] I now set out the case files and charges which are the subject of this appeal.

[1] Magistrates Court Case No. 22/12

Count 1

Statement of Offence.

Housebreaking contrary to section 289[a] of the penal code.

Particulars of Offence.

Nigus Salomon residing at Beau Vallon, Mahe on the 1st day of December 2011 at Foret Noire, Mont Fleuri, Mahe broke and entered the dwelling house of Jeline Pool with intent to commit a felony therein, namely, stealing.

Count 2.

Statement of Offence.

Stealing contrary to section 260 and punishable under section 264[b] of the penal code.

Particulars of Offence.

Nigus Salomon residing at Beau Vallon, Mahe on the 1st day of December 2011 at Foret Noire, Mont Fleuri Mahe stole from the dwelling house of Jeline Pool one [1] Notebook mark Dell, colour black and white to the value of Rs 10.000, one [1] digital camera to the value of Rs 2000 and Rs75 in coins all amounting to the total value of Rs 12,075/- being the property of the aforesaid.

[3] On 2nd October 2012, following his pleas of not guilty the Appellant was convicted after trial and sentenced to a term of 8 years imprisonment in respect of Count 1 and 2 years imprisonment in respect of Count 2, the sentences to be consecutive. The total term of imprisonment was thus 10 years imprisonment. It was ordered that the sentence of 10 years imprisonment be served consecutively with the sentence of 2 years 6 months in case No 21/2012 which was also finalized on that date. The Appellant appeals against sentence in case file 22/12.

[2] Magistrate Court Case No. 23/12

Count 1

Statement of Offence.

Housebreaking contrary to section 289[a] of the penal code.

Particulars.

Nigus Salomon residing at Beau Vallon Mahe on the 2nd day of December 2011 at Foret Noire, Mont Fleuri, Mahe broke and entered the dwelling house of Rita Bristol with intent to commit a felony therein, namely, stealing.

Count 2

Statement of Offence.

Stealing contrary to section 260 and punishable under section 264[b] of the penal code.

Particulars of Offence.

Nigus Salomon residing at Beau Vallon Mahe on the 2nd December 2011 at Foret Noire, Mont Fleuri, Mahe stole from the dwelling house of Rita Bristol one [1] digital camera mark Sony to the value of Rs 1900, one [1] gold bracelet to the value of Rs 2000 all amounting to the total value of Rs 3900 being the property of the aforesaid.

[4] On 25th October 2012 the Appellant pleaded Guilty to both charges and was duly convicted on both charges. He was sentenced to 8 years imprisonment in respect of Count 1 and 18 months imprisonment in respect of Count 2. It was ordered that both sentences be consecutive and hence the total term of imprisonment imposed was 9 years 6 months, which was to be served at the expiration of other sentences being served. The Appellant appeals against sentence.

[3] Magistrate Court Case No 289/12

Statement of Offence.

Burglary contrary to section 289[a] of the penal code.

Particulars of Offence.

Nigus Salomon during the night of 14th May 2012 at Beau Vallon, Mahe broke and entered the dwelling house of Robert Rees-Gibbs with intent to commit a felony therein. __

[5] On 4th March 2013 the Appellant was convicted after trial of this charge and sentenced on the 11th March 2013 to 15 year's imprisonment, which was to run consecutive to any other sentence he was serving. _The Appellant appeals against this conviction and sentence. __

FINDINGS.

- [6] I look first to the Magistrate Court file 21/12 since it is relevant when considering the whole circumstances relating to this Appellant. On 2nd October 2012 the Appellant was convicted after trial of the offences of Housebreaking and Stealing. The facts were that on 1st December 2011 at Foret Noire, Mont Fleuri, Mahe he broke into the dwelling house of Georgette Paul Belle and stole a hat valued at Rs. 300. He was taken as a first offender and sentenced to 18 months imprisonment in respect of the charge of Housebreaking and 1 year in respect of the charge of Stealing, both sentences to be consecutive. Thus the total term of imprisonment was 2 years 6 months imprisonment. This cumulative sentence was not the subject of appeal and cannot be considered excessive.
- [7] I now look to case file 22/12. The offences were similar to those in case file 21/12 i.e. housebreaking and stealing. The dates when the offences took place are the same, namely 1st December 2011. The place where the offences occurred is the same, namely, Foret Noire. For these offences the Appellant was sentenced to a total or cumulative term of imprisonment of 10 years.
- [8] I now look at Case file 23/12 and again similarities exist with cases 21/12 and 22/12. The offences again were housebreaking and stealing. The place that these offences occurred is again Foret Noire. The date of these offences in 23/12 is 2nd December 2011, that is, one day after the date when the prior offences occurred. The Appellant was sentenced to a total or cumulative term of 9 years 6 months imprisonment.
- [9] On considering the facts and circumstances in all three case files I can infer that the Appellant realized, after committing the offences on 1st December, that the houses in the area of Foret Noire were particularly vulnerable and he formed the view that he would be able to repeat his successes on the following day, and duly did. This level of repeated activity brings into issue an aggravating factor affecting the seriousness of the charges which again is to be reflected in the final sentences to be imposed. The Appellant can, however, expect that a court could consider a reduction in sentence where pleas of guilty were entered. All three sets of offences are similar in type, date and place of execution. In case file 21/12 the item stolen was not of high value. I have also to consider the totality principle to ensure that the cumulative sentence is proportionate to the offending behaviour which took place over the abbreviated period of 48 hours and is properly balanced.

- [10] It is to be noted that all the above sentences were ordered to run consecutively.
- [11] It is convenient to deal with these three cases and set aside for the moment the remaining case 289/12.
- [12] I look first at case file 21/12. I do not disturb the total sentence of 2 years 6 months imposed in case file 21/12.
- [13] In Case file 22/12 the Appellant was convicted after trial. The Appeal is against the cumulative sentence of 10 years imprisonment. The Magistrate dealing with this case was not a Senior Magistrate and hence in terms of section 6[2] as read with section 9[2] of the Criminal Procedure Code the existing aggregate sentence exceeds the sentence permitted in law. I find that the offences of Housebreaking and Stealing in case 22/12 are part of the same transaction or incident and that concurrent rather than consecutive sentences would be appropriate. In respect of the charge of housebreaking the sentence of 8 years imprisonment was at the upper limit of the sentencing powers of this magistrate. This sentence was imposed on the same date as the sentence in case file 21/12, namely 2nd October 2012. However, up to that date the Appellant had been a man of clear record. The above factors have to be balanced in respect of sentence. In the result, I quash the sentence of 8 years imprisonment in respect of Count 1 – Housebreaking - and in its place impose a sentence of 6 years imprisonment. The sentence of 2 years imprisonment in respect of Count 2 shall remain unchanged. These sentences shall be concurrent and hence the total sentence in Case file 22/12 is 6 years imprisonment.
- [14] In case file 23/12 the Appellant pleaded guilty to the charges of Housebreaking and Stealing and was convicted on both charges. He was sentenced to 8 years imprisonment in respect of Count 1 and 18 months imprisonment in respect of Count 2. The sentences were ordered to be served consecutively and hence a cumulative sentence of 9 years 6 months was imposed. Again this total term requires me to look at the sentence in the light of sections 6[2] and 9[2] of the Criminal Procedure Code. In my opinion the sentence of 8 years imprisonment in respect of Count 1 could be considered on the high side bearing in mind that the Appellant pleaded guilty. In the result, I take as a starting point 7 years imprisonment and allow a discount of 1 year for the plea of Guilty. Hence, in respect of Count 1, I quash the sentence of 8 years imprisonment and in its place impose a sentence of 6 years imprisonment. The sentence of 18 months imprisonment in respect of Count 2 shall remain unchanged. The sentences will be concurrent for the reasons stated in the

preceding paragraph and hence the total sentence in Case file 23/12 is 6 years imprisonment.

[15] I turn now to case file 289/12. The Appellant appeals against conviction and sentence.

[16] The thrust of this appeal relates to a procedural irregularity during the trial in the Magistrates Court. While the date of the offence in the charge was stated as 14th May **2012** evidence deduced showed the correct date of the offence was 14th May **2011**. On discovery of the error the prosecution applied to amend the charge to the earlier date which application was granted by the Magistrate. However, as Mr Gabriel has pointed out, the Magistrate omitted to read the amended charge to the Appellant and again take his plea. The amendment to the date was a material change. Counsel for the State concedes that this failure is in breach of the proviso to section 187[3][a] of the Criminal Procedure Code and the conviction and sentence cannot stand. State Counsel further submits that the error is rectifiable and seeks an order for retrial. Defence Counsel is also of the opinion that the conviction is unsafe and unsatisfactory and the appeal against conviction should be upheld but submits that no retrial should be ordered.

[17] In a very recent magistrates appeal case, *Peter Philoe v The Republic*, where judgment was given by me on 5th November 2014 the question of irregularity in the proceedings was considered. In the *Philoe* case State Counsel submitted six legal authorities, three from the courts of Seychelles and three from the courts of Mauritius. Four of the cases primarily focused on whether an accused could stand convicted in the absence of the specific word "convict" in the judgment. That is not the issue here. The remaining two Mauritius authorities, mentioned below, are in point. Each deals with the necessity that a formal plea to the charge or charges be taken from an Accused. Similarly, section 181[1] of the Seychelles Criminal Procedure Code requires that the charge is read to an Accused and he is asked whether he admits or denies the truth of the charge, that is, whether he pleads guilty or not guilty. The Proviso to section 187[3][a] of the Code similarly provides that where there is an amendment to a charge the accused shall be called upon to plead to the new charge.

[18] I look to the following two Mauritius appeal cases; [1] *Tahal v The Queen*, *The Mauritius Reports* 1968 at page 117, and [2] *Babeea v The Queen*, *The Mauritius Law Reports* at page 67.

- [19] In the Tahal case both counsel agreed that the omission to take a plea was fatal to a conviction. The Court of Appeal agreed that this failure went to the very root of a case, allowed the appeal and quashed the conviction. In the Babeea case the Court emphasized the requirement that a plea be taken. The law of Mauritius is similar to the law of Seychelles. In the Tahal case it was held that the requirement that a charge be put to an accused is not purely formalistic. In the Babeea case it was held that the absence thereof rendered the proceedings a nullity and this appeal was also allowed and conviction quashed. In neither case was a retrial ordered.
- [20] The appeal in case 289/12 is allowed and the conviction and sentence quashed.
- [21] I have considered the application for a re-trial in the present matter. The Court in the Tahal and Babeea cases did not make an order for a retrial. In respect of the application before me for a re-trial I take the above factors into account. I also keep in mind that all the evidence has been led but that the conviction was in respect of the original rather than the amended charge. It is my opinion that it would be inappropriate and contrary to the interests of justice to order a re-trial. The application for a retrial is refused.
- [22] I only now look at the cases, 21/12, 22/12 and 23/12 which relate to 3 cases of housebreaking and stealing which occurred within a 48 hour period. In two of the three cases the Appellant pleaded guilty. Prior to his convictions in cases 21/12 and 22/12 the Appellant had been of clear record.
- [23] The existing sentence in case 21/12 is 2 years 6 months imprisonment.
- [24] The amended sentence by this appeal in case 22/12 is 6 years imprisonment.
- [25] The amended sentence by this appeal in case 23/12 is 6 years imprisonment.
- [26] The conviction and sentence in case 289/12 is quashed.
- [27] The Appellant committed the offences in cases files 21/12 and 22/12 on the same day. As matters stand at present the existing order would require that these sentences in these 2 cases be served consecutively. I bear in mind that sentences for these types of offences should include a noticeable element of deterrence. However I am satisfied, looking to the totality principle and the culpability of the Appellant, that justice would be served by ordering that the sentences of 2 years 6 months imprisonment and 6 years imprisonment in cases 21/12 and 22/12 should be served concurrently rather than consecutively. This cumulative sentence of 6 years imprisonment for offences committed on 1st December 2011 will be served consecutively with the sentence of 6 years imprisonment imposed for

offences committed on 2nd December 2011. In the result the Appellant will serve a total sentence of 12 years imprisonment in respect of the 3 set of offences in files 21/12, 22/12/ and 23/12.

[28] Time spent on remand in connection with all four cases as aforesaid shall be taken into account when the ultimate date of release is calculated.

Signed, dated and delivered at Ile du Port on 1st December 2014

C McKee
Judge of the Supreme Court