

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 02/2014

Appeal from Magistrates Court decision 362/2013

[20115] SCSC 194

KEVIN RON FIGARO

Appellant

versus

THE REPUBLIC

Heard: 24 April 2015
Counsel: Mr Gabriel for appellant
Mr Vipin, Attorney General for the Republic
Delivered: 17 June 2015

JUDGMENT

Akiiki-Kiiza J

[1] The appellant was convicted by the Senior Magistrate and was sentenced to 8 years imprisonment on the first count and to a term of 5 years on the second count. The offences were House Breaking and Stealing from a dwelling house respectively. The sentences were to run consecutively. He is now appealing against the sentence. He has raised the following grounds in his memorandum of Appeal:

- (a)** That the sentence imposed by the learned Senior Magistrate was manifestly harsh, excessive and wrong in principle.

- (b) That the sentence of 8 years imprisonment on the 1st count and 5 years on the second count imposed by the learned Senior Magistrate should have been made to run concurrently.
- (c) That the sentence given by the learned trial Senior Magistrate failed to consider the mitigating factors put forward by the appellant and the fact that he had pleaded guilty.
- (d) That the learned trial Magistrate failed to consider the fact that about half of the value of the items stolen was recovered.

[2] He therefore prayed for quashing of the sentence imposed by the trial Magistrate.

[3] At the hearing, Mr Vipin represented the respondent, and Mr Gabriel appeared for the appellant. I will consider grounds (a) and (b) together.

[4] The learned trial Magistrate imposed 8 years imprisonment on the 1st count, and 5 years imprisonment on the second count. Both were to run consecutively which means the appellant have to serve a total of 13 years imprisonment. By the time the Senior Magistrate imposed the sentence of 13 years, her jurisdiction was 10 years imprisonment maximum. (6 (2) of the Criminal Procedure Code). The court of appeal has recently held to the effect :-

Despite the fact that the Penal Code provides for a mandatory term of imprisonment, and section 9 of criminal Procedure Code provided as a rule that he sentence in a case of conviction of several offences at the trial should be consecutive: a Magistrate cannot exceed his powers of sentencing set out in Section 6 (2) of the Criminal Procedure Code. Their Lordship concluded that both section 27 and 9 of the Criminal Code were dealing with punishment and thus cannot override the provisions pertaining to the jurisdiction of a Court in relation to sentencing powers it can impose, see **(RODDY LENCLUME VS THE REPUBLIC S.C.A Cr. App 32/2013 per A. Fernando, J.A)**

[5] In the premises therefore the total of 13 years imposed by the learned Senior Magistrate cannot be allowed to stand and is accordingly quashed.

[6] As regards grounds (c) and (d) of the Memorandum of Appeal I will also consider them jointly.

[7] Regarding the failure of the learned trial Magistrate to take into consideration the plea of guilty by the accused and failure to consider the mitigating factors in his favour, while passing the sentence , the lower Court record reveals the following entries:-

- 08.08.13

The accused first appeared in Court and opted for Legal Aid. He was admitted on bail. He appears to have failed to meet the bail conditions and he was remanded in custody.

- 24.09.13

The plea was taken and the hearing of the case started. The appellant was represented by Mr Herminie. The case was adjourned for hearing on 29/11/13, but the appellant had to continue coming to Court to have his remand extended. The case was re scheduled for hearing on the 20/12/13, and the accused remained on remand. On that day the appellant's lawyer was absent. The accused stated as follows:-

“ Accused:- Lawyer absent but I like to defend myself. I have committed the offence and guilty and seeks excuse of Court and asks family to forgive me”.

[8] Thereafter the learned trial Magistrate explained to the appellant the seriousness of the offence and the existence of the minimum mandatory sentence. The appellant told the Court that, he understood and insisted that he wanted to change his plea for not guilty to that of guilty, as he had committed the offence.

[9] Thereafter the learned Magistrate read the charge again to the appellant who pleaded guilty to both counts and he was convicted on the evidence which had been already adduced during the hearing of the case conducted earlier on.

[10] In the mitigation, the appellant stated as follows:-

“Twenty five years, seeks forgiveness of Court. Ask family forgiveness and sought forgiveness of foreign victims before left counsel. Bad elements influenced me. Have asked family and mother and father died and seeks excuse of Court and don’t want to waste Court’s time for feels guilty of offence”.

[11] In her Ruling on sentence, the learned Senior Magistrate considered the seriousness of the offence, count 1 attracting a minimum mandatory sentence of 8 years and a count 2 which attracts a maximum of 10 years.

- That only part of valuable property had been recovered.
- The prevalence of this type of offence.
- Foreigners were the victims, hence tarnishing the country’s image.
- Hence there was need to send a “clear an loud” message – by imposing appropriate sentence as a deterrence so as to protect society.

[12] Putting everything into account she sentenced the appellant to the minimum mandatory sentence of 8 years on first count and 5 years on the second count.

[13] It is now generally accepted by the Court that a plea of guilty would attract a rebate of about 20 % of the sentence to be imposed. Hence, 8 years would be about 1 year and 6 months and 5 years would be about 1 year. This would mean 1st count the starting point is 6 and a half years and the second count – 4 years.

[14] The learned Senior Magistrate appeared to feel bound by the mandatory nature of Act 5/2012 whereby she has to impose a minimum mandatory sentence. However, the Court of Appeal has since held that, the Court has full discretion to impose a lesser sentence than the minimum mandatory. (**PONOO CASE**). Secondly the same Court of Appeal held in **NEDDY ONEZIME VS THE REPUBLIC, SCA App. 6/2013** to the effect that **PONOO** principle also applied in respect of consecutive sentences, if it was in interest of justice to order sentence to the same trial to run concurrently.

[15] It is my considered view that noting the guilty plea, though belated , the youthful age of the appellant, his remorse and regret to have ashamed his family and nation, he deserved some rebate.

[16] Putting everything into consideration, I make the following orders.

I substitute the sentence of 5 years on the first count and 3 years on the second count. Both sentences to run concurrently.

[17] All in all the appeal succeeds to the above extent.

Order accordingly.

Signed, dated and delivered at Ile du Port on 17 June 2015

D Akiiki-Kiiza
Judge of the Supreme Court