

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CN 72/2014

[2016] SCSC

CLINTON DZINEMARIA

versus

THE REPUBLIC

Heard: 2nd December 2015
Counsel: Mrs. Ste. Ange State Counsel for the Republic
Delivered: 13th January 2016

JUDGMENT

Akiiki-Kiiza J

[1] The appellant was sentence to 5 years imprisonment on count 1 and 3 years on count 2 by the trial Magistrate. The sentences were to run concurrently but consecutive to any other sentence the appellant was serving.

[2] He raised the following grounds in the Memorandum of Appeal:

(a) That the total sentence imposed by the leaned Magistrate was manifestly harsh excessive on wrong in principle.

(b) That the learned Magistrate failed to consider the fact that the appellant had pleaded guilty and expected a further credit on sentencing.

(c) That the learned Magistrate failed to consider the fact that the appellant was serving another sentence imposed by the learned Magistrate. The appellant therefore prayed for the quashing of the sentence imposed by the learned Magistrate.

[3] At the hearing ,Mr. Nichole Gabriel represented the appellant and Ms. Ste. Ange appeared for the Respondent / Republic.

[4] The crux of this appeal revolves around whether or not the total sentence of 5 years imprisonment imposed by the learned trial Magistrate was fair and reasonable in the circumstance of the case and also whether it was fair and reasonable for the learned trial Magistrate to order that the sentence to run consecutive to any other sentence already being served by the appellant.

[5] It is Mr. Gabriel's contention that the appellant had pleaded guilty to both counts and given the fact that what the appellant had stolen had reverted back to the complainant, he should have received a lesser total sentence than that imposed by the trial Magistrate and should not have been ordered to run consecutive to an unknown and indefinite previous sentence imposed on him.

[6] On the other hand Ms. Ste. Ange for the Respondent submitted to the effect that the learned trial Magistrate was within her rights and within provision of the law to impose the sentence she had imposed and make the orders of consecutive sentencing as she did. She relied on Section 27 (1) (b) and Section 36 of the Penal Code to support the sentences imposed.

[7] The learned trial Magistrate relied on some old Authorities to reach her decision. To some extent , it is my considered view that given the facts of this case she was justified to impose a custodial sentence and were reasonable and justifiable in the circumstances of the case before her.

Hence I up hold the concurrent sentences of 5 years imprisonment on the first count, and 3 years on the second count.

- [8] The next issue for my determination is whether the order that the concurrent sentences of 5 years and 3 years (total 5 years) should run consecutive to any other sentence the appellant was serving.
- [9] Upon perusal of the lower Court record, it is apparent that the appellant had been sentenced to 6 years imprisonment 2 weeks prior to the present conviction (see page 6 of the proceedings of 17/10/2014 and on page 7) . This was an admission from the defence Counsel. This inevitability shows that the appellant was not a first offender. Hence this is what made the learned trial Magistrate to take into consideration the previous convictions even though there was no prosecutor's list showing previous convictions tendered in by the prosecution .This case is therefore distinguishable from the case of **RICHARD CONFIANCE VS THE REPUBLIC [2015] SCSC 610** cited by Mr. Nicole. In that case, no details were given by the prosecutor about the alleged previous sentence nor the Magistrate found out about the same before making consecutive order and the appellant could rightly set aside the consecutive order.
- [10] According to the lower court record in the present case, the previous conviction was entered about 2 weeks prior to the current one. The learned trial Magistrate noted that the previous conviction was for the offence of House Breaking which is more or less of similar nature of the current charges. In my view they could both be taken as offences committed in the same transaction, as there are separated by only 2 weeks. Also given the plea of guilty and the recovery of the stolen money and given that the complainant had suffered no material loss and there was no evidence of endangering the human life during the commission of the offence, I would apply the principle laid down in **PONOO** case and in the recent cases **RODDY LENCLUME VS THE REPUBLIC SCA 32 [2012]** and **NEDDY ONEZIME VS THE REPUBLIC SCA 06/13** and individualise the cases and impose a fair sentence despite the mandatory provisions of Section 27 and 36 of the Penal Code Act.

[11] Had the learned trial Magistrate considered the cases of NEDDY ONEZIME AND RODDY LENCLUME, I have no doubts that she would have ordered the sentences and the one appellant was already serving to run concurrently and not consecutively.

[12] Putting everything into consideration, I quash the order making the 5 years on sentence and 3 years on the first and second count to run consecutive to the previous sentence and substitute it for all the sentences to run concurrently.

This means that the appellant will serve a total of 6 years instead of 11 years. This appeal succeed to the above extent.

Order accordingly.

R/A explained to accused.

Signed, dated and delivered at Ile du Port on 13th January 2016.

D Akiiki-Kiiza
Judge of the Supreme Court