IN THE SUPREME COURT OF SEYCHELLES

Criminal Appeal No: 67 of 2014

[2017] SCSC 126

STEPHEN NOURRICE
Appellant

Versus

THE REPUBLIC

Heard:

Counsel: Mr. Nichol Gabriel for the Appellant
Mr. Khalyaan Karunakaran for the Republic

Delivered: 13th of February 2017

JUDGMENT

Seegobin Nunkoo J

[1] This is an appeal against conviction and sentence from a judgment of the Magistrates Court. Appellant was charged of the following offences.

1 Attempted House breaking

2 Criminal Trespass

3 Armed with intent to commit robbery

Count I

The particulars are as follows:

Samuel Esparon and Stephen Nourrice, both residing at Anse Aux Pins, Mahe on the 17th day of November 2011, at Fairyland, Mahe attempted to break and enter into dwelling house of Margaret Doffay with intent to commit a felony therein namely stealing.

Count 2

The particulars are as follows:

Samuel Esparon and Stephen Nourrice, both residing at Anse Aux Pins, Mahe on the 17th day of November 2011, at Fairyland, Mahe attempted to break and enter into dwelling house of Margaret Doffay with intent to commit a felony therein namely stealing.

Count 3

The particulars are as follows:

Samuel Esparon and Stephen Nourrice, both residing at Anse Aux Pins, Mahe on the 17th day of November 2011, at Fairyland, was in possession of an instrument namely a crowbar with intent to commit a felony.

[2] At the trial the Appellant was represented by Counsel and he pleaded guilty to all three counts.

[3] The Learned Senior Magistrate sentenced the Appellant to two years imprisonment on Count One; three years on Count Two and to six years on Count Three.

[4] He was required to serve all the three terms consecutively and the time on remand was also to be deducted.

[5] The appeal is against conviction and sentence on the following grounds:

On conviction

1. The Learned Senior Magistrate erred in convicting the appellant on insufficient and uncorroborated evidence

2.The Learned Senior magistrate erred in giving insufficient weight to the evidence of a police officer Wilson Denis which was favourable to the Appellant.

3. The Learned Senior magistrate misdirected herself in law and in fact on what constitutes an attempt to commit a felony.

On sentence

1. The Learned Senior Magistrate erred in giving the maximum sentence on counts 1 and 2 and erred in sentencing the appellant for ten years in count number 3 where the law provides for a maximum of sentence of seven years.

2. Learned Magistrate failed to consider concurrent sentencing for the Appellant.

[6] **SUBMISSIONS ON CONVICTION.**

(a) Learned Counsel pleaded all the three grounds together. Learned Counsel submitted that that the Learned Senior Magistrate had failed to write out the evidence of a very important witness, one police officer named Denis. This evidence according to him was favourable to the Appellant.

[7] Learned Counsel for Appellant also referred to the evidence of one lady police officer, Bochon, which according to him, again was favourable to the Appellant.

[8] Learned Counsel for Appellant submitted that the Learned Senior Magistrate erred by failing to give sufficient weight to the evidence of one police man, Officer Denis. He submitted that in fact the learned Senior Magistrate "failed to write out the evidence of this very important witness".

[9] On the issue of attempt Learned Counsel seems to be suggesting that the Appellant did not in participate in the act of breaking the door but was merely on the scene. This is something new. It was not pleaded at the trial nor is there any evidence on record to support this.

[10] Now this appears like counsel giving evidence from the Bar which is not acceptable.

[11] What is striking is the fact that at the time the two accused were attempting to break open the door, the maid, one Monthy, was inside the house and saw both accused. She shouted. Both ran away. D'Offay was contacted and they both drove in the direction in which the two accused had ran. She saw Accused Number One face to face and identified him. Later Accused Number 2 was arrested.

[12] The crux of the matter is that all the facts as put forward by the prosecution witnesses were admitted by the Appellant. We have it on record.

[13] There is no doubt that the evidence was strong and convincing and the Learned Senior Magistrate was correct in relying on it and finding Appellant guilty.

[14] I am not prepared to interfere with the conviction.

[15] **SUBMISSIONS ON SENTENCE**

It is relevant here to set out the sentences pronounced by the Learned Senior Magistrate

Count One: 2 years imprisonment

Count Two: 3 years imprisonment

Count Three: 6 years of imprisonment - in view of his young age (25 years) and the fact that no violence was used. The three terms to run consecutively. The total was 11 years.

[16] The Learned magistrate was right to point out that those offences were very serious and "by their very nature the only choice is imprisonment." The principle of a custodial sentence cannot be questioned. The questions that remain to be answered are:

- Whether the sentence as a whole or in totality was harsh and excessive;
- Whether the Learned Senior Magistrate was correct in opting for consecutive sentencing and whether this was fair
- Whether the sentences in respect of each count was fair
- And whether it was lawful when the prosecution did not bring any file referring to previous convictions, for the Learned Senior Magistrate to refer to her personal knowledge of previous convictions and rely on such knowledge for the purpose of sentencing.

[17] It was Learned Counsel's submission that the sentence was harsh and excessive; that the Learned Senior Magistrate was not bound to impose a mandatory sentence as regards count three and she erred in opting for ordering the sentences to run consecutively rather than concurrently and the sentences are therefore harsh. And finally she was wrong to have taken into account the priors when in fact the prosecutor did not in fact bring any such file to the attention of the Court.

[18] In support he relied on the cases of ***Ponoo vs AG 2011 SLR 424*** and ***Neddy Onezime vs The Republic SCA 6/13.***

[19] Learned Counsel for the Republic Mr Khalyaan Karunakaran submitted that the conviction was safe. As regards the sentences imposed by the Learned Senior Magistrate, he conceded however that the offences being related to the same incident, the sentences could have been made to run concurrently.

[20] I have gone through a series of pronouncements made by the Supreme Court on the

application of Section 27, relied by the Learned Senior Magistrate in determining the sentence, and the discretion that the Courts have in choosing or not choosing a mandatory sentence as well as on the choice between a concurrent and a consecutive sentence. In *Darrel Jean V The Republic* CN 69/ 2012 the Learned Judge when considering the issue of concurrent and consecutive sentencing had this to say:

The general principle of sentencing for offences which arise out of the same transaction or incident is stated at para 5-588 of Archbold. As a general principle consecutive terms should be imposed for offences which arise out of the same transaction or incident. A court may deviate from the general principle if there are exceptional circumstances. I interpret this to mean exceptional circumstances relating to the facts of the case or the offences.

[21] It may also be apposite to refer to the following paragraphs from ***Mervin Joubert V The Republic***

It is now trite law, since the decision in Ponoo vs AG (2011)SLR 424 that the Court still has discretion to impose any appropriate and befitting sentence on an accused despite the mandatory principles of section 27(2) (b) of the Penal Code.

Subsequent to the Ponoo case, the Court of Appeal in Neddy Onezime V The Republic SCA6/13 and Roddy Lenclume v The Republic SCA 32/13 declared, inter alia that, the principles in PONOO applied also to Section 36 of the Penal Code as it did to Section 27 of the same Code.

A court has the duty to impose a fair sentence and pay due regard to the principle of totality and proportionality. This was highlighted by the Learned Judge in ***Christopher Joubert V The Republic (2016-SCSC 787***. And also clearly asserted by the Court of Appeal in *Onesime*.

[22] I subscribe to the submission of Learned Counsel for Appellant that the Learned Magistrate erred in law by taking into consideration the prior for the purpose of sentencing when in fact the prosecution had not produced any such record. An adjudicator can take judicial notice of a fact within public knowledge but cannot rely on facts personally known to her

or him in coming to a conclusion on facts or judgement.

[23] I allow the appeal against sentence on count two and count three.

[24] I quash the sentence of three years and substitute a sentence of one year in respect of count two

[25] I quash the sentence on count three and substitute a sentence of three years instead of six years.

[26] I also order the sentences to run concurrently and the term served already to be deducted.

[27] The appeal against sentence on count One is not allowed.

Signed, dated and delivered at Ile du Port on **13th of February 2017.**

Seegobin Nunkoo
Judge of the Supreme Court