

IN THE SUPREME COURT OF SEYCHELLES

CriminalSide: CN 17/2015

Appeal from Magistrates Court decision 837/2011

[2017] SCSC 249

ROY LOZAIQUE
Appellant

versus

THE REPUBLIC

Heard: 03 March 2017
Counsel: Mr. E. Chetty for appellant
Mr. K Karunakaran, Attorney General for the Republic
Delivered: 17 March 2017

JUDGMENT

Vidot J

- [1] The Appellant appeals against a Judgment dated 05th February 2013 of Magistrate K. Labonte (as he then was). On the same day the Appellant was convicted to 10 years imprisonment on a charge of breaking and entering into a building and committing a felony therein contrary to section 291(a) and read with section 23 of the Penal Code.
- [2] The particulars of the offence are that the Appellant and 2 other persons, on the 11th December 2011 at Providence, Mahe broke and entered into a container belonging to

Serge Monthly Pty. Limited and stole therefrom 70 sacks of cement to a total value of SR1,050/-.

- [3] The Appeal as per the Memorandum of Appeal is against both conviction and sentence. On the date of the hearing Mr. E. Chetty, Learned Counsel for the Appellant indicated that he would rely on the ground of appeal against sentence only. That ground of appeal reads that “the sentence is manifestly harsh and excessive in all the circumstances of the case”.
- [4] Mr. Chetty argued that the sentence was harsh and excessive when applying the principle of proportionality of sentence considering the value of the property stolen, which is merely SR1,050/-. Mr. Chetty also urged court to give due consideration to the fact that the Appellant did not have at the time of conviction counsel who could have mitigated on his behalf.
- [5] Mr. Karunakaran, on behalf of the Respondent conceded that the sentence was excessive but reminded court that the sentence of 10 years was one that fell within the jurisdiction of the Leaned Magistrate.
- [6] Section 291(a) carries a penalty of 14 years imprisonment. Section 6 (2) of the Criminal Procedure Code (as amended as Act 4 of 2014) provides that “*the Magistrate Court when presided over by a Magistrate other than a senior Magistrate may pass a sentence authorised by law; Provided that such sentence shall not exceed in the case of imprisonment 18 years and in the case of a fine SR125,000/-* “. I note that the sentence was delivered before the enactment of Act 4 of 2014, when the sentencing power of the Magistrate was 8 years. That would suggest that the sentence of 10 years would be illegal. In **Danny Cadeau v Republic CN94 of 2013** a sentence of 12 years by the Senior Magistrate was held to be illegal because at that time the jurisdiction of such magistrate was 10 years.
- [7] By Act 5 of 2012, section 27 (1) of the Penal Code was amended to provide as follows;
- “*Notwithstanding Section 26 and any other written law and subject to subsection (2) , a person who is convicted of an offence in Chapter XXVI, XXVIII, XXIX shall...*

- (i) *where the offence is punishable with imprisonment for more than 10 years or imprisonment for life and,*
- (ii) *it is the first conviction of a person for such an offence, be sentenced for a period of not less than 15 years; or*
- (iii) *the person had within 5 years of the date of the conviction, be convicted of the same or of a similar offence, for not less than 25 years.*

[8] At the time of the sentence the Appellant had previous conviction for house breaking and stealing from a dwelling house, which are offences falling within Chapter XXIX of the Penal Code. On a strict application of Section 27(1)(c) of the Penal Code, the Appellant should have been convicted to not less than 25 years imprisonment. In the case of **Danny Cadeau v Republic** (supra) it was held that since Section 291(a) provides for a term of imprisonment of 14 years, a court could not impose a term above that irrespective of Section 27(1) mentioned above which is a general provision and cannot override a specific provision as in the in the case of section 291(a). Be that as it may, the Magistrate imposed a sentence of 10 years which is below the sentence provided in Section 27(1)(c).

[9] However, the tendency now has been to move away from mandatory minimum sentence. In **Jeffrey Paul Leon v Republic CN 95/2013**, the court adopted principles laid down in **Ponoo v AG SCA 38/2010** which provides that trial court may impose a lesser offence than mandatory minimum. **Ponoo** has been adopted in a number of cases such as **Michel Nassim v Republic CN71/2013** and **Brian Revera v Republic CN2 /2015**. I am assuming that in imposing the sentence the Learned Magistrate had both Section 27 (1)(c) and **Ponoo** in mind.

[9] Mr. Chetty has in his submission referred to the sentence being excessive in that it is not in proportion with the value of the items stolen. The purpose of a sentence is to administer a punishment that is just, that acts as deterrence, provides for rehabilitation, is a denunciation of the unlawful act and it provides community protection. It should satisfy the test of reasonableness and suitability. I bear in mind that at the time of sentence the Appellant had previous conviction and I agree with Mr. Chetty that the sentence is

excessive. I also bear in mind the sentencing jurisdiction, of the Learned Magistrate as at the time of imposition of the sentence, as discussed above, and find it to have been unlawful. I also bear in mind the ratio in **Ponoo** and therefore putting everything into consideration substitute the sentence of 10 years with a sentence of 6 years which I feel would meet the course of justice in the circumstances.

[10] Therefore, the appeal is allowed and the sentence substituted as above mentioned.

Signed, dated and delivered at Ile du Port on 17 March 2017



M Vidot
Judge of the Supreme Court

